United States Court of Appeals

TENTH CIRCUIT.

No. 4930.

WAYNE S. MARTENEY, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

FILED JUNE 14, 1954.

INDEX

	Original	Print
Indictment	1	1
Clerk's minute re arraignment and plea	11	3
Motion to dismiss	12	3
Verdict	35	3
Motion for judgment of acquittal, etc.	38	3
Affidavit of Emmet A. Blaes	41	5
Affidavit of Oren Couch	....	7
Letter, April 17, 1953, Oren Couch to New York Jockey Club	47	10
Letter, April 21, 1953, New York Jockey Club to Oren Couch	48	11
Judgment and commitment	52	11
Notice of appeal	53	12
Statement of points relied on	115	13
Orders extending time for docketing cause (statement)	....	14

	Original	Print
Narrative statement of trial proceedings:		
Testimony:		
Allison, Paul	61	16
Burris, W. W.	59	14
Cannefax, Bert	63	17
Egbert, Jr., Francis E.	70	21
Reiser, George B. (recalled)	69	21
Reiser, George B. (recalled)	71	22
Vaughn, James	68	20
Motion for judgment of acquittal	73	23
Narrative statement of testimony of Wayne S. Marteney	74	24
Excerpts from argument to jury by Mr. Gallagher, counsel for plaintiff	103	48
Certificate of the absence of evidence	107	51
Defendant's requested instructions 2 and 5	13	52
Charge to jury	20	53
Summarization of defendant's objections to charge to jury	108	63
Clerk's certificate	119	68

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE DELMAS C. HILL, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

WAYNE S. MARTENEY, DEFENDANT.

No. 8887.-Criminal.

Indictment.

15 U.S.C., Section 714m(c).

The grand jury charges:

Count One.

1 On or about December 21, 1951, in the District of Kansas, the defendant, Wayne S. Marteney, did unlawfully steal, conceal, remove, dispose of and convert to his own use and to that of the Garden Grain and Seed Company, Inc., Garden City, Kansas, approximately 9,164 pounds of grain sorghum, which said grain was then and there properly owned by Commodity Credit Corporation, an agency and instrumentality of the United States.

[Counts two to twenty-eight, inclusive, are identical in form with count one with the exception of the dates of the alleged offenses and the number of pounds of grain alleged to have been stolen and converted. The dates and the number of pounds are set out as:

Count two: Dec. 18, 1951—13,140 pounds.
Count three: Dec. 17, 1951—11,794 pounds.
Count four: Dec. 15, 1951—13,768 pounds.
Count five: Dec. 13, 1951—18,567 pounds.
Count six: Dec. 12, 1951—18,183 pounds.
Count seven: Dec. 11, 1951—23,010 pounds.
Count eight: Dec. 10, 1951—20,988 pounds.
Count nine: Nov. 19, 1951—26,760 pounds.

Count ten: Nov. 20, 1951—27,507 pounds.
Count eleven: Nov. 17, 1951—28,128 pounds.
Count twelve: Nov. 15, 1951—27,239 pounds.
Count thirteen: Nov. 14, 1951—29,027 pounds.
Count fourteen: Nov. 13, 1951—31,120 pounds.
Count fifteen: Nov. 12, 1951—31,723 pounds.
Count sixteen: Nov. 10, 1951—37,506 pounds.
Count seventeen: Nov. 9, 1951—41,258 pounds.
Count eighteen: Nov. 8, 1951—43,840 pounds.
Count nineteen: Nov. 3, 1951—33,977 pounds.
Count twenty: Nov. 1, 1951—43,629 pounds.
Count twenty-one: Oct. 31, 1951—46,257 pounds.
Count twenty-two: Oct. 26, 1951—53,459 pounds.
Count twenty-three: Oct. 25, 1951—40,232 pounds.
Count twenty-four: Oct. 22, 1951—57,017 pounds.
Count twenty-five: Oct. 16, 1951—62,260 pounds.
Count twenty-six: Oct. 11, 1951—65,370 pounds.
Count twenty-seven: Oct. 9, 1951—84,261 pounds.
Count twenty-eight: Sept. 11, 1951—52,878 pounds.]

Count Twenty-nine.

During the period beginning from on or about April 1, 1950, to and including September 10, 1951, in the District of Kansas, the defendant, Wayne S. Marteney, did wilfully steal, conceal, remove, dispose of and convert to his own use and to that of the Garden Grain and Seed Company, Inc., Garden City, Kansas, grain sorghum in excess of 5,000,000 pounds, approximately 89,000 bushels, which said grain was then and there property owned by Commodity Credit Corporation, an agency and instrumentality of the United States.

A true bill.

H. WADE ZIMMERMAN,
Foreman.

W. J. BOWERSOCK,
Assistant United States Attorney.

Bond fixed at $5,000.00.

DELMAS C. HILL,
Judge.

Filed Aug. 21, 1952.

11 Clerk's Note: At Wichita, Kansas, on November 3, 1952, before Honorable Delmas C. Hill, United States District Judge, Defendant Wayne S. Marteney appeared with retained counsel Emmet A. Blaes for arraignment and plea and Defendant Marteney entered a plea of not guilty on all counts. The United States was represented by Eugene W. Davis, United States Attorney.

Motion to Dismiss Counts 1 to 28, Inclusive.

12 The defendant moves to dismiss Counts 1 to 28 inclusive of the Indictment for the reason that no one of them charges an offense against the defendant.

A. LEWIS OSWALD,
EMMET A. BLAES,
for OSWALD & MITCHELL,
JOCHEMS, SARGENT & BLAES,
Attorneys for Defendant.

Filed Feb. 17, 1953.

Verdict.

35 We, the jury in the above-entitled cause, duly impaneled and sworn, upon our oaths, find the defendant guilty as charged in Count One of the Indictment herein.

[The verdict also found the defendant guilty on Counts Two to Twenty-nine inclusive.]

HARRY F. CORBIN,
Foreman.

Filed Feb. 27, 1953.

Motion for Judgment of Acquittal, Arrest of Judgment, and New Trial.

38 The defendant, Wayne S. Marteney, enters Motions as follows:

1. The defendant renews his Motion for Judgment of Acquittal heretofore made at the conclusion of the Plain-

tiff's evidence and at the conclusion of all of the evidence. Said Motion is based on the following grounds:

a. Counts 1 to 28, inclusive, of the Indictment fail to charge an offense.

b. As to all counts, the proof offered by the plaintiff constituted a material and prejudicial variance from the charges made in the Indictment.

c. The evidence of the plaintiff considered as a whole was insufficient as a matter of law to sustain a conviction on any count of the Indictment.

2. The defendant moves for arrest of judgment on Counts 1 to 28, inclusive, for the reason that no one of said Counts of the Indictments charges an offense.

39 3. In the alternative to the foregoing Motions, and in the event the foregoing Motions, or any part of them, be denied, the defendant moves for a new trial in the interest of justice and specifically upon the following grounds:

a. The Court erred in permitting the plaintiff, over the defendant's objections, to introduce evidence pertaining to collateral matters having no relationship to the offenses charged.

b. The Court erred in permitting the plaintiff to attempt to prove charges at a variance from the unambiguous wording of the Indictment, which proof could not be reasonably anticipated by the defendant, and which variance was prejudicial to the defense.

c. The Court erred in permitting the plaintiff to conduct a cross-examination of the defendant, over the defendant's objections, on matters completely outside of the scope of the direct examination.

d. The rights of the defendant were materially prejudiced by the misconduct of counsel for the plaintiff in the cross examination of the defendant and in arguments to the jury.

e. The Court erred in erroneously charging the jury on

important matters of law, which errors were highly prejudicial to the rights of the defendant.

f. The Court erred in failing to charge the jury in accordance with the specific requests of the defendant.

g. The verdict of the jury was not supported by substantial evidence.

EMMET A. BLAES,
for OSWALD & MITCHELL,
JOCHEMS, SARGENT & BLAES,
Attorneys for the Defendant.

Filed with proof of service March 4, 1953.

Affidavit of Emmet A. Blaes in re Variance Between Indictment and Proof.

State of Kansas, County of Sedgwick, ss.

41 Emmet A. Blaes, of lawful age, being first duly sworn, makes the following affidavit:

I was one of the attorneys for the defendant, Wayne S. Marteney, in the trial in the above entitled matter. Because of a protracted illness of A. Lewis Oswald who was also one of the attorneys for the defendant, which illness immediately preceded the commencement of the trial on the 17th day of February, 1953, the bulk of the preparation for the said trial, and the work of the trial itself, fell upon me.

My entire preparation for the defense of the defendant was on the firm belief and expectation that the various counts of the indictment were intended to charge that the Commodity Credit Corporation had on, or at approxi-
mately the dates set forth in the various counts,
42 been the owner of specific quantities of grain sorghum, that said quantity, or approximately said quantity, of grain sorghum had been delivered by the Commodity Credit Corporation into the possession of the Garden Grain and Seed Company, and that this specific grain was converted by the defendant to his own use or to that of the said Garden Grain and Seed Company. At no time was I informed, or did I suspect prior to the trial, that

what the Government actually intended by the various counts of the said indictment was not that any specific grain whatsoever was owned by the Commodity Credit Corporation, but only that the Commodity Credit Corporation was the owner of an undivided interest in certain grain stored as part of the commingled mass in a bonded warehouse, and that the alleged conversion consisted of shipments of much greater quantities of such grain in which the Commodity Credit Corporation was alleged to have only a fractional undivided interest subject to the peculiar complexities of the law merchant and the Uniform Warehouse Receipts Act.

If I had been able to anticipate such a variance from the allegations of the indictment, an entirely different line of proof would have been appropriate as a defense to the said allegations, and from my knowledge of all of the facts, I am informed and do believe that a number of the counts of the indictment could have been disproved. The necessary evidence for such disproof, however, would have required detailed and voluminous accounting procedures which could not possibly be done in the course of the trial. Such evidence would have included among other things evidence on the following points:

43 1. Evidence that the grain liabilities of the Garden Grain and Seed Company were substantially different from the amounts claimed by the prosecution, and that many of such differences had already been adjudicated in courts of record.

2. Evidence that various shipments relied upon by the Government as being grain from a commingled mass in which the Commodity Credit Corporation had an interest were in fact shipments of grain that had never entered such commingled mass and were shipments in which the Commodity Credit Corporation had no interest whatsoever.

3. Evidence that the grade and quality contained in the said shipments was such that such grain was not acceptable to the Commodity Credit Corporation and could not under any circumstances have been delivered to it, and that the defendant's company had no choice but to make other disposition of the said grain.

4. Evidence that certain of the said shipments of grain had actually been tendered to Commodity Credit Corporation but were refused, and that the defendant's company had no alternative but to dispose of them through other channels.

By reason of the foregoing variance in the allegations of the indictment and in the theory of the Government's proof, the entire defense was prejudiced, and the defendant did not have a fair and reasonable opportunity to present all of the facts applicable to each of the many counts of the indictment.

Further affiant saith not.

EMMET A. BLAES.

Subscribed in my presence and sworn to before me this 30th day of March, 1953.

NELL MCCOMB,
Notary Public.

(Seal)

My commission expires 11-26-56.

Filed April 1, 1953.

Affidavit.

State of Kansas, County of Sedgwick, ss.

44 Oren Couch, of lawful age, being first duly sworn, upon oath deposes and says:

Affiant is one and the same person as Orin Couch as his first name is spelled by the Court Reporter in the record of the testimony of Wayne Marteney taken in the proceedings had in Case No. 8887 in the Federal Court at Wichita, Kansas, in the case styled United States of America, Plaintiff, vs. Wayne S. Marteney, Defendant, and is the same person referred to in said testimony as the payee of a certain $500.00 check and as the claimant of a certain racehorse named "Handy Grand."

Affiant states that the $500.00 check referred to in

said testimony as Plaintiff's Exhibit No. 86 was a check given affiant by Wayne Marteney as an advance on a growing crop of Hegari seed then owned by Affiant and then being grown by Affiant on certain real estate then under lease by Affiant from the City of Garden City, Kansas, and legally described as:

All that certain tract and parcel of land bounded and described as follows: Commencing at a point on the East line of Section 20 in Township 24 South, Range 32 West of the Sixth P.M., 2174.2 feet South of the Northeast corner of said Section 20, thence South on and along said East line of said Section 20 a distance of 507.3 feet to the North bank of the Arkansas River, thence Westerly along and meandering the Northerly bank of the said Arkansas River North 53 degrees West 521.5 feet; thence North 68 degrees and 25 minutes West, 525.3 feet; thence North 61 degrees and 40 minutes West, 475.5 feet; thence North 57 degrees and 30 minutes West 545 feet; thence South 73 degrees and 47 minutes East, 1859.1 feet to the place of beginning, the same comprising a triangular tract bounded on the South by the Northerly bank of the Arkansas River, and containing 18.8 acres, more or less, Finney County, Kansas.

45 Affiant states that said check was given him on or about July 25, 1949, despite the fact that the check bears the date "7-25-47." Affiant states that the legend written on the face of the check "Advance 329 bu. grain" is an exact statement of the purpose for which the check was given Affiant and accepted by Affiant.

Affiant further states that this $500.00 check was presented by Affiant for deposit to the Garden National Bank, Garden City, Kansas, on July 27, 1949, and then and there deposited to the account of the Affiant.

Affiant states that for a number of years, including the years 1947, 1948, 1949, 1950, and 1951, he was a farm owner and was engaged in farming operations in the vicinity of Garden City, Kansas, and during all those years Affiant had numerous grain transactions with Wayne S. Marteney, the Garden City Feed and Seed Company, and the Garden Grain and Seed Company, Inc. These trans-

actions included the purchase of seed, feed, and grain on many occasions, and the sale of seed, feed, and grain. Affiant states that a majority of his seed sales during the years aforesaid were made to Wayne S. Marteney, Garden City Feed and Seed Company, and Garden Grain and Seed Company, Inc.

Affiant states that on July 24, 1949, at La Mesa Park, Raton, New Mexico, he claimed a certain racehorse named "Handy Grand" out of the Tenth Race for a claiming price of $800.00, having deposited the claiming price in advance of the race.

Thereafter, Affiant as owner raced Handy Grand at the 1949 State Fair Race Meet at Albuquerque, New Mexico, and received the purses won by Handy Grand at said Meet.

46 Affiant states that sometime during the winter of 1949-1950 or the early spring of 1950 he sold a one-half interest in Handy Grand to Wayne Marteney for the sum of $400.00 and received payment therefor in cash.

Handy Grand was next entered at Aksarben, Omaha, Nebraska, for the spring racing meet of 1950 and the horse was registered under the ownership of Affiant and Wayne Marteney. This registration with the Nebraska State Racing Commission was made on or about May 11, 1950.

The claiming price for Handy Grand at Aksarben was $3,000.00 and on June 15, 1950, Handy Grand was claimed for that price by E. H. Bezley. No part of the said $3,000.00 was received by Wayne Marteney since the entire proceeds were expended in feeding and maintaining the horse prior to the time he was claimed.

On the 17th day of April, 1953, Affiant wrote to the New York Jockey Club a letter, a carbon copy of which is attached hereto, and received in response thereto an answer dated the 21st day of April, 1953, the original of which is attached.

Attached to this affidavit are letters from La Mesa Park, Raton, New Mexico, and the New Mexico State Racing Commission to confirm Affiant's statements relating to Handy

Grand. Also attached are the receipts of the Nebraska State Racing Commission pertaining to the registration and entry of Handy Grand for the Spring season of 1950 at Aksarben.

Further Affiant saith not.

OREN COUCH.

Subscribed and sworn to before me this 29th day of April, 1953.

J. WIRTH SARGENT,
Notary Public.

(Seal)

My commission expires 1-10-56.

Filed May 19, 1953.

P. O. Box 2134, Wichita, Kansas, April 17, 1953.

New York Jockey Club, 250 Park Avenue, New York, N. Y.

47 Gentlemen: It has become very important for me to show just what is reflected on your records pertaining to a horse which I claimed at the La Mesa Park, Raton, New Mexico, on July 24, 1949, by the name of Handy Grand.

I am enclosing a stamped and addressed envelope and would very much appreciate your writing me giving me just what information your records show. If it is possible to get a photostatic copy of the entry in your records including the claiming price, etc., I would very much like to have it and would be glad to pay whatever extra cost is involved in the procuring of such a photostatic copy.

I enclose a money order in the sum of $5.00 which I understand to be the usual fee for such information.

Very truly yours,

OREN COUCH.

The Jockey Club
250 Park Avenue
New York

April 21, 1953

Mr. Oren Couch, P. O. Box 2134, Wichita, Kansas.

48 Dear Mr. Couch: We are returning herewith your money order in the amount of Five Dollars since The Jockey Club does not have in its records the information which you require.

It is suggested that you address the authority under which racing is conducted in New Mexico or seek the assistance of the Stewards at La Mesa Park.

Very truly yours,
THE JOCKEY CLUB,
By JOHN F. KENNEDY.

JFK:es
encl.

Judgment and Commitment.

52 On this 16th day of December, 1953, came the attorney for the government and the defendant appeared in person and by counsel, Emmet A. Blaes and Lewis Oswald, at Wichita, Kansas.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, entered Nov. 3, 1952, and a verdict of guilty of the offense of unlawfully stealing, concealing, removing, disposing of and converting grain to his own use and to that of the Garden Grain and Seed Company, Inc., Garden City, Kansas, which said grain was properly owned by the Commodity Credit Corporation, an agency and instrumentality of the United States, in violation of 18 USC, section 714m(c) as charged in Indictment of 29 counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed

to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on each of the 29 counts contained in the Indictment, said sentence to run concurrently, aggregate sentence five years, but sentence to run consecutively to the sentence imposed by this Court in case numbered 8886 on December 16, 1953.

It Is Further Ordered that a stay of execution is hereby granted defendant until January 15, 1954.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DELMAS C. HILL,
United States District Judge.

Approved:
WILLIAM C. FARMER,
Assistant U. S. Attorney.

Entered Dec. 16, 1953.

Notice of Appeal.

Appellant: Wayne S. Marteney, Plains, Kansas. Appellant's Attorneys: Oswald and Mitchell, Hutchinson, Kansas; Emmet A. Blaes, Wichita, Kansas. Offense: Violations of 15 U.S.C., Section 714m(c), twenty-nine counts. Judgment and Sentence: Judgment of conviction rendered December 16, 1953. Sentence to five years' imprisonment on each of twenty-nine counts of indictment, to run concurrently.

53 I, the above named appellant, hereby appeal from the above stated judgment, to the United States Court of Appeals for the Tenth Circuit.

Dated this 26th day of December, 1953.

WAYNE S. MARTENEY,
By EMMET A. BLAES,
Attorney for Appellant.

Filed Dec. 26, 1953.

Statement by Appellant of Points Relied Upon.

115 The defendant, Wayne S. Marteney, appellant in the above entitled matter, states that the points on which he intends to rely on the appeal in the said matter are as follows:

1. The Court erred in holding that the first 28 counts of the Indictment charged an offense against the defendant.

2. The Court erred in holding that the statute 15 U.S.C. 714 (m) is applicable to the conversion of interests in property subject to the Warehouse Receipts Act.

3. The Court erred in holding that the plaintiff's evidence under the first 28 counts was not a prejudicial variance from the allegations of the Indictment.

4. The Court erred in permitting evidence to be introduced on matters which were wholly collateral and were highly prejudicial.

116 5. The Court erred in its charge to the Jury by giving it an incorrect definition of wilfulness, by improperly instructing as to the effect of the Commodity Credit storage contract, by incorrectly instructing the Jury as to the effect of performing an act through an agent, and by refusing to give defendant's requested instructions 2 and 4.

6. The Court erred by permitting plaintiff's counsel to engage in improper and prejudicial conduct.

7. The Court erred in holding that there was sufficient evidence on any count to submit the case to the Jury.

Dated this 10th day of June, 1954.

A. Louis Oswald,
Emmet A. Blaes,
Roetzel Jochems,
Counsel for Appellant.

Filed with proof of service June 11, 1954.

[By orders of Jan. 29, 1954, March 22, 1954, May 4, 1954, and May 26, 1954, the time for docketing the cause in the Court of Appeals was extended to June 15, 1954.]

Narrative Statement of Portions of Record on Appeal.

58 Attached hereto are narrative statements of a portion of the evidence designated for the record on appeal in the above entitled matter.

A. Louis Oswald,
Emmet A. Blaes,
Roetzel Jochems,
Counsel for Wayne S. Marteney,
Defendant and Appellant.

Narrative Statement of Testimony of W. W. Burris.

59 I am proprietor of the Strong Grain Company, Dodge City, Kansas, and I had various grain transactions with the Garden Grain and Seed Company during the months of September, October, November, and December of 1951.

I have with me the files pertaining to those transactions. Each envelope contains the shipping information, confirmation to the buyer, confirmation of sale for the shipper's account, account of sale from the buyer, account of sale to the shipper, and other associated papers.

The first file is Exhibit No. 33. It represents a car purchased on November 24, 1951. It was actually shipped on December 18th from Pierceville to Dodge City. The shipment was in fulfillment of a contract I had with them for the purchase of a car of grain. We paid an advance on the car of $2,100.00.

"Mr. Gallagher: May it please your Honor, I want to offer this whole file in evidence in connection with the First Count of the Indictment, which charges that on or about December 21, 1951, there was this conversion of grain . . .

"Mr. Blaes: Your Honor, I am somewhat mystified as to the purport of this testimony. I object to it as being irrelevant and immaterial to any issue in the case. Apparently this is a record of some shipment of grain."

(At this point, the Jury was excused and there was an extended discussion set forth in the Transcript at pages 159 to 175. The Defendant objected to the evidence on the ground that it had no relation to the offense charged in the Indictment, that the Indictment charged the theft of specific quantities of grain on specific days from
60 Commodity Credit Corporation, that the evidence had to do only with a shipment of grain out of the warehouse, which grain did not belong to CCC but was a part of the commingled mass of grain belonging to all of the warehouse depositors, that the Indictment had not charged any alleged conversion of an undivided interest in grain deposited under the Warehouse Act, and that any such change in theory on the part of the Government was a complete surprise to the Defendant, could not have been anticipated from the allegations of the Indictment, and such evidence should not be received.)

"The Court: The objection will be overruled."

(Thereupon, the Plaintiff proceeded to identify further files produced by the witness and pertaining to other shipments of carloads of grain from the Garden Grain and Seed Company. The files were identified as Exhibits Nos. 33 to 52, inclusive, to all of which the Defendant made the same objection, which was in each instance overruled. Each Exhibit pertained to one carload of grain, and the quantity of grain in each instance was approximately 100,000 pounds, depending upon the size of the car, etc.)

Cross Examination.

Our firm is one of the regularly established grain brokerage and commission firms of Dodge City. All of these transactions were handled just in the regular course of business. To my knowledge, there was nothing irregular or out of line about them at all. No one ever indicated that there was anything about them that should be kept secret, and I had no reason to suspect that anything was wrong.

Narrative Statement of Testimony of Paul Allison.

61 I am a partner in the Paul Allison Company of Fort Worth, Texas. I have the files pertaining to transactions for the purchase of carloads of grain from Garden Grain and Seed Company during October and November, 1951.

(Thereupon, the witness produced records which were admitted as Exhibits Nos. 53 to 58, inclusive, covering shipments of carloads of grain and settlements for the same with Garden Grain and Seed Company. The Defendant made the same objection as was made to the similar records produced by the preceding witness, and the objection was in each instance overruled.)

Cross Examination.

I am a partner in the firm. We buy and sell grain and operate several small country elevators. We operate as brokers on occasion. Our transactions with Garden Grain and Seed Company were in the usual course of business as an established grain concern and were exactly like the same kind of transactions with hundreds of others. There was nothing irregular or out of the ordinary about them, nor was there any indication that there should be anything furtive or secret about them.

The six carloads of grain about which I have testified represented only two separate purchases from the Garden Grain and Seed Company. The carloads of grain described in Exhibits Nos. 53, 54, 55, and 56 were one separate contract, our purchase number No. 3537, and the four of them represent four separate cars constituting one purchase of grain from Garden Grain and Seed Company. Likewise, the cars represented by Exhibits Nos. 57 and 58 represent simply shipments in two separate cars of grain purchased under one purchase order.

62 (Counsel for the Plaintiff identified Exhibits Nos. 53, 54, 55, and 56 to refer to the allegations in Counts Nos. 19, 20, 21, and 24, respectively; and Exhibits Nos. 57 and 58 referred to the Counts Nos. 26 and 28, respectively.)

Narrative Statement of Testimony of Bert Cannefax.

63 I live at Dallas, Texas, I am an accountant with the Department of Agriculture, Compliance and Investigation Branch. (Tr. 219.) I and three assistants made an investigation of the condition of Garden Grain and Seed Company. We spent about two months on the work.

As a result of our work, I am able to determine with reasonable accuracy the day to day position of the company with respect to the storage of grain in its warehouses. We reconstructed the inventory from July 1, 1949, to the date the Receiver took over, January 17, 1952. July 1, 1949, was about the time the corporation was formed. The company was in a long position on grain from the beginning until November 4, 1949. On that day, there was a shortage figure of 415,735 pounds. From that day on to the end, there never was a day when the records of the company showed it to be able to meet its storage obligations.

I prepared a summary of the results of our examination showing the receipts of grain for each month, the sales and shipments for that month, the quantity sold for that month, and the lowest percentage during the month of CCC's ownership of the grain.

(The summary referred to is Exhibit No. 59. It purports to show the lowest percentage of ownership of Commodity Credit Corporation in the commingled mass of grain for each month from April, 1950, to September, 1951, inclusive. The lowest percentage for any one month was 22.72%, and the highest percentage for any one month was 98.23%.)

Cross Examination.

64 The books of the company were not kept up. There was no records compiling the information and keeping it in a way so that you could walk in there and tell from one day to the other what the grain position was. (Tr. 252). A person could not have gone in there and gotten the information we got without doing substantially and comparably the same job that I and my staff did.

The greatest amount of grain that Commodity Credit Corporation had any claim to, directly or indirectly, against Garden Grain and Seed Company on January 17, 1952, when it went into receivership was 3,130,032 pounds. Except for that amount, all of Commodity Credit's portion of the many millions of pounds of grain that were put into the warehouse by it over the years had been accounted for and delivered back to Commodity Credit. I have totalled up the poundage as taken from the various counts of the Indictment which Mr. Marteney is accused of having stolen, removed, disposed of, concealed, and converted to his own use. The total amount is 5,999,062 pounds or just 938 pounds short of an even 6,000,000. Included in the Indictment is the difference between those two figures, which difference was completely accounted for and redelivered to Commodity Credit Corporation.

According to my investigation, the day that Garden Grain and Seed Company passed into the hands of a Receiver appointed by this Court, there was actually 4,800,000 pounds of milo in its warehouses. Applying the same formula that I have to the various shipments of carloads, the actual percentage of ownership of Commodity Credit Corporation in that grain was 66%. In other words, it would be about the same as the 3,130,032 pounds. So that as of the 17th day of January, 1952, there was actually
65 present in the warehouses of Garden Grain and Seed Company when the grain passed into the hands of this Court a quantity of grain almost identical in amount according to my own computations, of the total amount of claims of Commodity Credit Corporation against Garden Grain and Seed Company.

Redirect Examination.

In computing the percentage on the final balance found in the warehouses, I did not use the same basis upon which I had computed the percentages previously. Using the figures the same as I figured the other shortages, CCC had 13.99%. On that basis, CCC would be proportionately entitled to 2,285,313 pounds. That is taking all of the outstanding obligations as they existed on that date.

Recross Examination by Mr. Blaes.

"Q. Mr. Cannefax, let's try to straighten out this accounting gymnastics now. I asked you awhile ago to compute the ownership of Commodity Credit Corporation in the actual physical grain that was on hand at the time the corporation passed into the receivership in this Court and to use the same basis for arriving at it that you had used in these other computations which you made yesterday and you gave us the figures and the percentages.—A. Sir, you didn't state it that way.

Q. Now what did you do?—A. I actually used the inventory, beginning inventory, like you asked me to, to find out the proportion belonging to CCC after the, or to find out the physical inventory left in the warehouse.

Q. What beginning inventory are you referring to?—A. Ending inventory I said—I am sorry, if I said beginning.

66 Q. Now that is exactly what I want you to do. I want you to take the ending inventory of grain on hand and apply it to the same computations which you have made here in trying to compute these percentages of ownership.—A. Sir, there are hundreds of owners in that time in the grain.

Q. I understand all of that, that you didn't own all of the grain, if that is what you are saying. Now if that isn't what you did, what did you do?—A. I did exactly as you asked me, sir.

Q. All right, then, what did you assume that I asked you?—A. You asked me what portion of the grain and I told you it was about 67 percent, sir.

Q. Now, does that or does that not mean that according to your audits of the physical grain that was left in the warehouses at the time of the actual transfer of the business to the jurisdiction of this Court, that 67 per cent of the grain then in existence in the warehouses was an undivided interest of Commodity Credit Corporation in that grain, is that what you mean?—A. I understood you, sir, to say that portion of the 4,800,000 that belonged to Commodity.

Q. Is that true?—A. The figure I gave you, sir, is approximately so.

Q. Then do I understand— —A. If we consider the sole owner, sir.

Q. Do I understand, as I did on your cross examination a few moments ago, that according to your computations Commodity Credit Corporation owned that interest in that fungible mass of grain that was actually physically there at that time?—A. That is about right, sir.

67 Q. Well now, I am not trying to take advantage of you, Mr. Cannefax. What is the computation then that you are trying to testify here to for Mr. Gallagher?—A. Sir, I am merely trying to answer the questions that are asked me.

Q. All right now, what are the figures you gave him?—A. I gave him a percentage figure, sir, based on our portion of the overall obligations of the warehouse of which there were many, many ownerships, many, many owners, and our portion, our proportionate part, our percentage, is the 13.99 per cent that I read to him, sir, and the 2,285,331 pounds is the actual quantity that we would have had at that time.

Q. Now isn't that the same computation as the one you just made and if not, why not?—A. No, sir.

Q. Why not?—A. Sir, you asked me that portion of CCC's interest in the 4,800,000 actual inventory at the end and I gave it to you to the best of my ability.

Q. Now just so that we understand it once and for all, at that time there was actual physical grain in the warehouse?—A. Yes, sir.

Q. And that physical grain measured approximately 4,800,000 bushels?—A. Yes, sir.

Q. I mean pounds.—A. Pounds is right.

Q. And according to your audits the interest of CCC in that mass of grain represented an amount of a little over three million pounds?—A. Right, sir.

Mr. Blaes: That is all."

Narrative Statement of Testimony of James Vaughn.

68 I am with the B. C. Christopher Company, Kansas City, Missouri. We had some transactions with Garden Grain and Seed Company. I have the papers pertain-

ing to a shipment of a carload of grain that we bought. The car was billed November 15, 1951, at Pierceville, Kansas, with a billed weight of 120,000 pounds.

(The records were offered as Exhibit No. 60. The Defendant objected to them on the same basis as the previous shipments. The objection was overruled.)

Cross-Examination.

Our firm is a regular grain brokerage business established in 1878. Our transactions with Garden Grain and Seed Company were all open and above board in our regular business which we do with the public every day.

Narrative Statement of Testimony of
George B. Reiser, Recalled.

Cross-Examination.

69 When Mr. Cannefax gave the figure of 3,130,032 pounds as being the total claim for all grain that the Commodity Credit Corporation still held against Garden Grain and Seed Company at the time it went into receivership, that figure included certain warehouse receipts, Exhibit No. 72, which purports to be receipts for the 1951 crop. These particular receipts were in the hands of lending institutions until they came into the hands of Commodity Credit Corporation. I do not have with me the records as to when they were purchased by Commodity Credit. As it stands today here, I do not know which receipts were, or which receipts were not, owned by Commodity Credit Corporation on the 17th day of January, 1952. The total of them is 737,285 pounds. If you deduct them from the total claim of 3,130,032 pounds, the result is 2,392,747 pounds.

Narrative Statement of Testimony of Francis C. Egbert, Jr.

70 For ten years, I have been employed by the Atchison, Topeka and Santa Fe Railway Company at Pierceville, Kansas, and I have produced here the local way bill records for August, September, and October of 1951.

Way Bill No. 3 covers a shipment of bulk milo October

9, 1951. The shipper was Garden Grain and Seed Company to the order of Garden Grain and Seed Company, notify Herman Dawson Company at Denver, Colorado. The shipper's weight was 105,880 pounds. The shipment had inbound billing references from Hugoton, Kansas.

The car was loaded at Pierceville. It was not a shipment that came there and then passed on. The Way Bill is Exhibit No. 75.

(The Exhibit was offered in evidence in support of Count No. 23 of the Indictment. The defendant objected to it for the same reasons that he objected to all the preceding documents pertaining to shipments. The objection was overruled.)

Narrative Statement of Testimony of
George B. Reiser, Recalled.

71 I have again examined the warehouse receipts which represented the 1951 crop. By comparing them with other records, I can tell the date on which Commodity Credit took over the notes and the warehouse receipts that were collateral security to the notes.

Receipt No. 155 was purchased on January 16, 1952. Receipt No. 175 was also purchased on January 16, 1952. Receipt No. 174 was purchased on January 22, 1952. Receipt No. 154 was purchased on January 15, 1952. Receipt No. 139 was purchased on January 15, 1952. Receipt No. 150 was purchased on January 15, 1952. Receipt No. 117 was purchased on February 5, 1952.

Cross-Examination.

The earliest date at which any of these receipts was purchased was January 15, 1952, or several weeks after December 21st, being the last date referred to in the Indictment at which any conversion is alleged.

Redirect Examination.

When a producer or farmer wants to get some money on his crop under the guarantee of the Commodity Credit Corporation, he takes a warehouse receipt to his County Committee, there signs a loan application, which also is in

the form of a note, and when that is approved, he takes the papers to the bank or the loan company and gets his money. The date of the approval of the loan on warehouse receipt No. 155 was November 26, 1951, on receipt No. 175 it was December 5, 1951. On receipt No. 174, it was December 21, 1951. On receipt No. 154, it was November 26, 1951. On receipt No. 149, it was November 19, 1951. On receipt No. 150, it was November 19, 1951. On receipt No. 117, it was October 18, 1951.

Recross Examination.

72 Exhibit No. 72-G is a typical example of these different notes. The payee on this particular note was Fidelity State Bank, Garden City, Kansas. Attached to the note is a statement which reads in part "The producer hereby sells, assigns, pledges, mortgages, and/or hypothecates to the payee named in the Producer's Note and to any subsequent holder thereof, as collateral security for the payment of the note, the warehouse receipts or other documents representing the commodity described in the Schedule of Pledged Commodity below."

Motion for Judgment of Acquittal.

(The Government having rested, the following proceedings took place.)

73 "Mr. Blaes: Your Honor please, the defendant now moves for a judgment of acquittal on all 29 counts of the indictment. Briefly, the motion is based on three propositions. The first is that as to the first 28 counts of the indictment the indictment fails to state any offense. The second is that there was a complete variance between the allegations of the indictment and the evidence which the Government has produced and the variance was of a kind which the defendant could not have under reasonable interpretation of the indictment anticipated or prepared for, and as a consequence thereof, came as a complete surprise to the defendant and was highly prejudicial to his defense in this matter. And the third is that there has been a failure of any evidence of such kind as would be sufficient to sustain the allegations of any count of the indictment and

from which a Jury could find beyond a reasonable doubt that the defendant was guilty on any count of the indictment.

Now, your Honor, that much for the motion itself and the rest of what I will have to say is by way of argument and discussions.

(Thereupon, counsel made oral arguments to the Court, which are not transcribed in this record.)

The Court: The motion will be overruled. Bring the Jury in."

Defendant's Testimony.

Narrative Statement of Testimony of Wayne S. Marteney.

74 I was Vice President and General Manager of the Garden Grain and Seed Company to various consignees, there is no question in my mind but that those shipments were actually made. I didn't personally make any of the shipments, or probably even the contracts for the sale of the grain. At the same time, however, there is no question but that whatever was done by anybody was done by persons who had been given authority to do it.

I never personally loaded out a single car of grain. In those instances where the evidence shows that various cars were shipped to comply with one purchase order, or to comply with one contract of sale, I did not have anything to do with the matter of loading out the various cars that made up that purchase order. I probably would have known how many cars it would take to fill the order if I had seen it, but I am not even sure that I saw the orders.

In addition to purchases and sales of grain that went into or came out of the commingled grain in the warehouse, our firm made purchases of grain and then turned around and sold them under circumstances where they would never go into the mass in the warehouse. It was a frequent type of transaction and was done all the time. There is nothing unusual or irregular about it, and it is done in the industry generally all the time.

75 I have a personal recollection of the transaction involved in bill of lading marked Exhibit No. 75 purporting to reflect the shipment of a car of grain from Pierceville on the 9th day of October, 1951. There is no indication on the way bill as to whether or not that car was unloaded or anything.

I remember this shipment because Herman Dawson and Company bought several cars of grain from us at this time to be shipped to Denver and on in to Pacific Northwest. They were peculiar because corn bore certificates had to accompany them. The certificates had to be to the effect that the shipment had either been inspected or else you had to screen the grain over a certain size of screen to take out the corn bores.

This particular shipment was one of that type. It was purchased at Hugoton and brought to Pierceville, where it was dropped into the hopper, run over a half inch screen, cleaned, loaded in the car and shipped to Herman Dawson with a corn bore certificate accompanying it. It was never unloaded into storage and never commingled with other grain in storage.

I do not know with reference to how many of these other 27 carloads of grain that same situation might be true. There would be no way to find out without an audit of the movements of the different cars and examination of the books and records to try to piece together the facts as they occurred away back there when these cars were shipped. It would take a long time to do that. I do not know whether any of these 27 cars came out of the commingled mass of grain in the warehouse.

Cross Examination.

76 "Q. The first time you learned that these receipts were illegally issued and contrary to law was after or during the bankruptcy, is that right?—A. That is correct.

Q. When the warehouse receipt, the warehouse examiners, came to see you, as you have told us, did you show them the warehouse books, the receipt books out of which these receipts had been issued?—A. I don't think personally I ever showed them anything.

Q. That is what I thought. Now wasn't it a convenience—

Mr. Blaes: Now, your Honor please, I am going to object to these kind of voluntary statements on the part of counsel and—

The Court: Yes, just ask the question and let the witness answer it.

Mr. Gallagher: Yes, Your Honor.

The Court: All right.

Q. Wasn't this a convenient way of keeping from the notice of the warehouse inspectors of the state of Kansas that you had issued receipts on grains and if they knew you issued them on grain they would check on you to see if they were there?—A. It couldn't have been, Mr. Gallagher, because the banks and everyone knew that they were using them and their department checked very closely with the banks.

Q. Everybody knew about it but the warehouse inspectors?—A. They should have known. We wrote them a letter about it—two, in fact. * * *.

Q. * * * What other places did you have any grain
77 at?—A. I believe those were the principal points.

Q. I don't mean principal points. I mean any place you had it.—A. I wouldn't know any others right at the moment.

Q. How much did you have at this place—that is the one place you had—Harvest Queen mill in Texas?—A. I don't know. That was early—I think it all consisted of wheat.

Q. Oh. So that was the milo grain that you could have to substitute for the Commodity Credit grain that should have been in your warehouse at Pierceville, at Garden City? —A. No, sir. You asked what other point we had grain, Mr. Gallagher.

Q. Oh, I did?—A. Yes, sir.

Q. And you thought your answer that you had grain at one of these points would satisfy me, did you?—A. No, I don't know what—

Mr. Blaes: Your Honor, we object to that argumentative type of question.

The Court: The last question is argumentative.

Mr. Gallagher: Very well, Your Honor, I will withdraw it.

Q. So you had wheat some place in Texas in a warehouse that you had stock in and was that what you were talking about when you said you had grain out of position?—A. No, sir.

Q. What were you talking about?—A. Your question was—

Q. Never mind my question. What were you talking about when you told us last week that you had grain out of position in sufficient quantities to satisfy all outstanding warehouse receipts to the Commodity Credit Corporation? —A. I was talking about milo.

Q. And where was it?—A. Those points that I gave you."

* * * * *

"Q. You sold the Central Grain Corporation some
78 warehouse receipts, didn't you?

Mr. Bowersock: Central States.

Q. Central States. Do you remember that?—A. I think on the contract we were—we sold grain and warehouse receipts were sent in lieu (sic) of the sale for delivery at a later date on the grain.

Q. How much did you sell them?—A. All total, you mean?

Q. Yes.—A. I couldn't answer that.

Q. You never sent them any grain, did you?—A. Yes, sir, I believe they were delivered—I can only recall one instance where they were delivered fifty or sixty thousand —I wouldn't know how much we delivered to them.

Q. You got over $300,000.00 from that company, the Central States, and there still remain undelivered on their contract something like $280,000.00; do you remember that?

Mr. Blaes: Your Honor please, I am going to object to this line of examination for this reason: First of all, it is improper cross examination. There is no testimony that has been introduced here pertaining to those transactions, and, secondly, and primarily, because now we are getting

into a great number of collateral issues that have no relationship to any of the issues involved in this prosecution and we can be here until doomsday trying all of those matters involving all of these other creditors and so on of the corporation.

The Court: Overruled.

79 Q. You got over $400,000.00 from the Central States Company. Do you remember them?—A. Central States Company?

Q. Yes, the distilling company.—A. Yes, sir.

Q. And you got all of that from them by check; do you remember that, you got the full amount of your contract?—A. I don't believe we received $400,000.00. That seems like quite a large amount but I know we did get quite a bit from them.

Q. And you kept all you got, didn't you?—A. Kept?

Q. Kept all you got.

Mr. Blaes: What do you mean by he kept all they got? Are you talking about Mr. Marteney, the defendant, or about the corporation?

Mr. Gallagher: I am asking him if he kept all he got. I think that is plain and anyone could understand it.

Mr. Blaes: I object to the question, your Honor, unless he specifies whom he means by "he kept all they got."

The Court: Overruled.

A. I personally—if that is what you mean—didn't never get anything from them.

Q. Who got it?—A. Any money transaction that involved Central States, to my knowledge, would go to the corporation.

Q. And what happened to it then?—A. You mean the money?

Q. Yes.—A. Well, I expect it was used in the usual process of the business.

Q. Of course I mean money. Process of shipments out of grain on the orders to people who paid for it, you mean?—A. No, I would say the money was used in the usual course—anything received deposited and checks drawn against it for whatever it was necessary in the corporation.

Q. Well, you testified about the claim of the Cen-
80 tral States corporation a couple of times, didn't you?—A. Yes, sir, they have a claim.

Q. You went over there before the referee in bankruptcy, didn't you?—A. I know they have a claim, yes, sir.

Q. I say you testified about it under oath, didn't you?—A. To what part of the claim?

Q. To the whole claim.—A. I don't think I testified to the exact amount of their claim.

Q. You identified the checks you received, didn't you?—A. Well, I know—

Q. Can't you answer that?—A. I know we received a number.

Q. Weren't you shown checks in that claim and didn't you identify them as checks from that company to your company?—A. I don't know that I did, but I know we received checks from them, Mr. Gallagher, if that is what you want to know.

Q. I want to know what you testified to. You seem very vague about it this morning and I want to know if you didn't testify about it on two or three occasions and had every chance in the world to check your figures and look it up.—A. I am sorry, I don't understand what you mean. I thought—I tried to explain it.

Q. What I am trying to get at is this: Isn't this what happened with respect to that company: They would call or write you and say ship us some grain on our contract to the distillery here; we need some grain; and you would have prepared a draft and in the draft you would place a warehouse receipt for the number of bushels of grain that they were buying; isn't that what happened?—A. If they already had it bought and they would send for some delivery on their contract, would not enclose a draft.

Q. Well, you did send drafts up there, didn't you?—A. Yes, sir, I think the company sent drafts to draw against Central States, I believe that is correct.

Q. You knew about them as they were sent, didn't
81 you?—A. Not in all instances, no, sir.

Q. Do you remember what month this was?—A. Yes, I believe this was in the months of the fall of 1951. I believe this was in the months of the fall of 1951.

Q. The fall of 1951 after October 10th, when you knew there was a shortage there, wasn't it?—A. I didn't know there was a shortage, but I believe it was after October the 10th, Mr. Gallagher.

Q. Yes. And you knew you didn't have any grain there to sell, didn't you?—A. No, sir.

Q. Did you think you had $400,000.00 worth of grain there of your own that you could sell?—A. Yes, in the fall we had over a million bushels at one time, Mr. Gallagher.

Q. How long, about ten days?—A. No, I think the figures will bear it out that we took in a tremendous lot of grain in the fall of 1951.

Q. You sold a tremendous lot, too, quick, didn't you?—A. Yes, we bought and sold quick all the time when it was coming in, Mr. Gallagher.

Q. Well, you sold the Central States a lot of grain that you had there and it turned out that you didn't have it because they never got it, isn't that so?—A. Yes, I didn't think it was $400,000.00 worth, though.

Q. I say you sold them a lot of grain that you thought you had and it turned out you didn't have it; isn't that right?—A. Yes, sir. They never have received all their grain that I believe we sold them.

Q. And they filed a claim for that, $274,000.00 against your company for money they paid you for grain they didn't get, because you didn't have it in your warehouse or out of position, or any place else?—A. I don't know the amount, but it was a very substantial—

Q. Those were the facts, weren't they?—A. No,
82 I don't believe in all cases that statement was the facts. We could look up the claim in the records, Mr. Gallagher.

Q. We don't have to look the claim up, Mr. Marteney. We know about the claim. It was filed in the Court here, as a matter of record against your company and you testified about it more than once and you know all about it, don't you?—A. You asked me if $275,000.00 and I wouldn't recall whether that is the exact amount or not.

Q. It is pretty close to that?—A. I can give you what I thought it was.

Q. It was pretty close to that.—A. I thought his fig-

ure could be wrong to the extent of $50,000.00; yes, I was thinking it was less than that.

Q. It was only about $200,000.00?—A. I was thinking around $225,000.00, something like that.

Q. For grain that you sold them and couldn't deliver?—A. At least we never did get delivery.

Q. You couldn't deliver it; that is the answer, isn't it?—A. Well,—

Q. When you sent them those sight drafts they were supposed to be—the bill of lading drafts—they were supposed to be accompanied by a bill of lading, weren't they?—A. No, sir, I don't believe so.

Q. You mean you issued drafts for grain that was being shipped without shipping any?—A. No. I think the warehouse receipts or the money that was drawn from them—it was not an understanding at that time to ship it with a bill of lading because it was to be a future shipment, Mr. Gallagher, not right at the time of the transaction.

83 Q. Was there anybody else you were dealing with on that similar condition, where you were getting money from them for shipments and the shipments weren't being made?

Mr. Blaes: Now, Your Honor, that is not what the witness testified to, that he was getting money for shipments and the shipments not being made. He testified that he was getting money for the warehouse receipts, for the sale of the grain as evidenced by warehouse receipts. I object to the form of the question.

Mr. Gallagher: May it please Your Honor, I leave that to the Jury, what he testified to.

The Court: Do you withdraw your question?

Mr. Gallagher: No, Your Honor. I think the Jury is to decide.

The Court: Overruled. He may answer.

(The question is read by the Court Reporter.)

A. Mr. Gallagher, we weren't getting money for shipments then, the shipments were not being made.

Q. What were you getting the money for then, if it wasn't for grain that was supposed to be shipped to these

people?—A. They purchased warehouse receipts from us and the grain was to follow later along with the bill of ladings.

Q. You didn't have the grain in there when you sold them the warehouse receipts then, did you?—A. Well, I imagine—I thought we did—or the company wouldn't have sold them.

Q. We thought we did. Who do you mean 'we thought we did'?—A. I am referring to the company, sir.

Q. Oh, didn't you do the thinking for the company?—A. Well, not in all cases, no, sir.

Q. Well, you said you did, didn't you?—A. I don't believe I testified that I did all of the thinking for the company, no, sir.

Q. Let me ask you what you did say. It is pos-
84 sible that someone got an answer from you—

Mr. Blaes: Your Honor, I object to these side remarks and ask that counsel be cautioned.

The Court: Yes, refrain from making side remarks. Ask the questions of the witness.

Mr. Gallagher: I will, Your Honor, thank you.

Q. That is the way the question was asked and that was your answer?—A. Well, I mean those statements are correct that you just related to me, being the general manager and vice-president.

Q. All right. 'In the capacity of general manager, Mr. Marteney, you were, of course, familiar with the operation and financial condition of your corporation at all times, were you not?' And your answer was: 'Yes, sir.' Do you remember that?—A. Well, I would say my answer would be yes, sir.

Q. Look at the record there.—A. You see, you are asking me just identical questions.

Q. I am asking you a question you didn't want to hear asked, as a matter of fact, am I not?—A. No.

Mr. Blaes: Now, Your Honor, he admitted giving the testimony and there is no purpose arguing about it.

The Court: Yes, refrain from arguing with the witness.

Mr. Gallagher: He hasn't answered it yet, may it please Your Honor.

The Court: I say refrain from arguing with the witness, please.

Mr. Gallagher: I am sorry, I didn't think that was argumentative, Your Honor.

The Court: Well, I am sure that it was.

Mr. Gallagher: Very well."

* * * * *

"Q. Now the reason that you had those printed and
85 the reason that you had them numbered was because you couldn't issue these receipts the way you were issuing your own; isn't that right?—A. We had them printed to use for collateral, Mr. Gallagher.

Q. That is right. These receipts you couldn't take another man's grain and ship it out and use it for collateral or anything else but your receipts you could, right?—A. No, I think we had to use those also—

Q. You could and did—

Mr. Blaes: Now, are you asking a question, Mr. Gallagher, or is that a statement?

Mr. Gallagher: I certainly am asking.

Mr. Blaes: I object to counsel making statements here before the Jury. I have no objection to his asking proper questions.

The Court: Yes, I have admonished counsel before about that. Now, I am not going to tolerate any side remarks.

Mr. Gallagher: May it please Your Honor, I was asking him a question. He asked me if I meant something.

The Court: All right, proceed, but you ask the questions without making any comments.

Mr. Gallagher: All right, sir."

* * * * *

"Q. Who would you send this letter to that you address as 'H' except Harper?—A. Well, I don't recall anybody particularly.

Q. This note says: 'H. Anyway we tried?' And your initial underneath.

Mr. Gallagher: May I show this to the Jury?

The Court: You may.

Q. Now, what did that mean 'Anyway we tried?'—A. Well, I really don't know.

Q. It meant you tried to pull the wool over their eyes and they kept insisting for the grain to be delivered, didn't it?

Mr. Blaes: To which we object, Your Honor, as being argumentative.

The Court: Sustained."

* * * * *

"Q. Did you try to get back some of the money of
86 the corporation that you had spent?

Mr. Blaes: I didn't get that question.

Q. I say, at that time did you try to get back for the corporation some of its money you had spent?

Mr. Blaes: To which we object, Your Honor. There is no evidence that he has spent any money that he was supposed to get back.

The Court: Overruled.

A. I don't know what money you are talking about, Mr. Gallagher.

Q. Well, I am talking of some money you gave a fellow named Couch, do you recall him, Oren Couch?—A. Yes, sir.

Q. You gave him some money, didn't you?—A. Yes, sir.

Q. What for?—A. We had a number of transactions with Mr. Couch.

Q. Well, tell me about it.—A. Which one do you want to know about, sir?

Q. Any one.—A. Well, when we first were in business I remember one or two times in particular we handled most of his alfalfa seed back in 1948 and 1950.

Q. What is his business now, what is he doing?—A. I don't know what Mr. Couch's business is right now.

Q. He is running a bowling alley down at Garden City, isn't he?—A. He was the last I knew.

Q. Was he running a bowling alley when you had transactions with him?—A. No, I believe not, sir.

Q. Did you have any bowling alley transactions with him?—A. No, I believe not. We were bankrupt when he took the bowling alley, I believe.

Q. He wasn't bankrupt, was he?—A. I said I believe the company was.

87 Q. The company was. Well, do you remember back in 1949 giving him some money on a check of the Garden Grain and Seed Company for five hundred dollars?—A. Yes, it could have been.

Q. It was, wasn't it?—A. I am not sure about the date, but I believe that could be correct.

Q. June or July of 1949?—A. It could have been along in the summer.

Q. And what was that for?—A. I would pretty nearly have to see the particular check, sir.

Q. You would try to recall without looking at the check, wouldn't you? We will see how good your memory is.—A. It could have been for several things along there in the summer. If you will tell me which one, I will sure try.

Q. You tell me which one of several it might be.—A. I just got through naming some instances we had dealings with him.

Q. I asked you to try to tell me one or two of the dealings you had with him which would justify your giving him a Garden Grain and Seed Company check.—A. I did, sir. I told you about buying alfalfa seed from him.

Q. All right, tell me some more, if any.—A. Well, I think that is all I would recall right at the moment.

Q. All of the business dealings you had with him then concerned legitimate transactions in which you took care of the interest of the Garden Grain and Seed Company, is that right?—A. I think all of my operations with him I considered legitimate.

Q. And in which transactions you took care of the best interests of the Garden and Seed Company, right?—A. Well, I tried to, sir.

88 Q. What possible connection with the Garden Grain and Seed Company would the Garden Grain and Seed Company have with a race horse?—A.

Well, I think before we incorporated he and I had an interest in a race horse.

Q. And you gave him a check?—A. Yes, I think he was given a check.

Q. Is that it, five hundred dollars?—A. Well, I don't know whether this particular one is it or not, sir.

Q. What does it say at the bottom?—A. This check is—at the bottom?

Q. Yes.—A. Says 'advance three hundred twenty-nine bushels of grain'. Is that what you want to know, sir—'Wayne S. Marteney'—for Wayne S. Marteney.

Q. Would you say that was for payment of grain?—A. I wouldn't know whether it would be grain or something else, sir. At least the check says that is what it is.

Q. And that is in your handwriting there, isn't it?—A. Yes, that is right.

Q. So many bushels of grain?—A. That is my handwriting.

Q. And you say you still don't know whether it was for grain or not?—A. I would suppose that it was.

Q. You will not definitely swear on the witness stand today that it was for grain, will you?—A. I wouldn't swear what that was for, no, sir.

Q. And was the Garden Grain and Seed functioning back in the middle of 1947?—A. No, sir.

Q. Why date a check in 1947 if the company wasn't in existence at that time?—A. If it did, it would be an accident, sir. We didn't start until 1949, in the summer, in Garden Grain and Seed Company. I had Garden City Feed and Seed before then. It might have been confused with that.

89 Q. You wouldn't put a date back on a check a couple of years to take a transaction out of the statute of limitations, would you?—A. No, sir.

Mr. Gallagher: May it please Your Honor, I offer this check in evidence as our Exhibit Number 86.

Mr. Blaes: To which we object as being irrelevant and immaterial, having no relationship to any issue.

The Court: Are you going to connect it up?

Mr. Gallagher: Immediately, Your Honor.

The Court: With that understanding it will be admitted.

Q. Now, as a matter of fact, Mr. Marteney, that check was given as your share in the purchase of a race horse, wasn't it?—A. Well, now, I don't know whether that check was or not.

Q. What?—A. We owned a race horse together, but I don't know whether that would be the check or not.

Q. Do you know that the records of the New York Jockey Club, 250 Park Avenue, New York, indicate that a horse named Handy Grand was claimed by Oren Couch from La Loma Stud, on July 24, 1949, at La Mesa Park, Raton, New Mexico, and that the claiming price was five hundred dollars?—A. No, sir, I didn't know the claiming price was five hundred dollars.

Q. You knew a claim had been made on the horse and that your friend Couch had gotten him?—A. Yes, I know he claimed the horse about that time.

Q. And that was on or about July, 1949, wasn't it?
90 —A. It would be in June or July, sir. I couldn't tell you the exact date.

Q. July 24, 1949.—A. Will you—

Q. Will you look at that and see what date that was presented to your bank down there for payment and cancellation?—A. That looks like seven—I can't get the date—1949. I can't make out the center date, but it looks like it would be the seventh month in '49.

Mr. Gallagher: May the Jury see this, may it please Your Honor?

The Court: They may.

(A document is handed to the Jury.)

Q. You can't make out that the date was the 7th, the 28th of July, 1949?—A. Well, it certainly could be. I know it looks like it is July.

Q. You said you couldn't make out the date and that is what I am trying to find out.—A. No, sir, I couldn't when I looked at it, no, sir. The date of July—not the year or the month.

Q. Whose name was the horse registered in at the Jockey Club after it was claimed, yours and Couch's, or Couch's,

or yours?—A. It would have to have been under Mr. Couch's, sir.

Q. Why?—A. Because the man that claims the horse—I didn't have a race horse—and you can't claim a race horse unless you own one, and I think it would probably would have been registered under his name.

Q. But you kept a half interest in it, right?—A. Yes, I was supposed to have a half interest in Handy Grand.

Q. What was the idea of using a company check to buy a half interest in a race horse?—A. I don't know that I did, sir.

Q. Can you find any conceivable answer to the question as to whether or not you gave Mr. Couch any money in the month of July except that check for that horse?—A. I don't know whether I could or not, sir.

Q. You do know you gave him a five hundred dol-
91 lar check, anyhow, don't you; you've seen that?—A. Yes, sir.

Q. And do you deny that that was for the race horse?—A. I don't know whether it was for the horse or not.

Q. You won't say it wasn't, will you?—A. I won't say it was or it wasn't, sir.

Q. Well, now, you had some business dealings with Mr. Couch later, too, didn't you?—A. Yes, we had business with Mr. Couch right along.

Q. What kind of business?—A. We bought wheat, milo, alfalfa, hegari; he usually raised hegari seed in quite large quantities of it.

The Court: I think we will take our noon adjournment at this time.

The Bailiff will announce an adjournment of Court until 2:00 o'clock. Members of the Jury, we will adjourn until 2:00 o'clock p. m.

(Thereupon, the noon hour having arrived, recess is had until 2:00 o'clock p. m. of the same day; whereupon, the parties appearing as before, the following further proceedings are had.)

Q. I believe you told us, to the best of your recollection, about this horse purchase, is that right, buying the horse?

Do you know what I mean?—A. I know what you are talking about but I didn't get the first part of the question.

Q. I said I understand that you have told us to the best of your recollection the circumstances surrounding that purchase, is that right?—A. I believe that is correct.

Q. Did Couch put in any money?—A. Sir.

Q. Did Couch put in money into the purchase of the horse?

92 Mr. Blaes: Now, Your Honor, to which we object, for the reason it is irrelevant and immaterial to any issue contained in this matter.

The Court: Approach the Bench.

(Counsel and the Court conferred at the Bar of the Court, out of the hearing of the Jury and the reporter.)

The Court: The objection is sustained.

Q. I believe this horse that you purchased was named Handy Grand, is that right?—A. I believe that is the name of the horse.

Q. Don't you know?—A. Yes, sir.

Q. Well, it was, wasn't it?—A. He had a lot longer name. I believe that was his short name, was Handy Grand.

Q. And the horse was sold or claimed some time after this incident for $3,000.00 cash, wasn't it?

Mr. Blaes: To which we make the same objection, Your Honor. It is an entirely collateral matter, having no relation to any issue in this suit.

The Court: Sustained.

Q. You testified about this matter before the referee, did you not, the purchase of the horse?

Mr. Blaes: To which we make the same objection, Your Honor.

The Court: Yes, sustained.

Q. I ask you to look at this check dated 7/31/50. It is apparently July 31, 1950, $3,500.00. Do you recognize that?

Mr. Blaes: To which we make the same objection, Your Honor.

The Court: Let me see the check.

(A document is handed to the Court.)

The Court: Sustained.

Mr. Gallagher: May this be marked as an Exhibit and offered for identification so we may have it as a matter of record, please? May the record show it was offered as Exhibit Number 87?

The Court: Yes. It will be refused.

93 Q. At the time you purchased and owned that horse, you knew that you were short on Commodity Credit warehouse receipts and thousands of other warehouse receipts, did you not?

Mr. Blaes: To which we object, Your Honor, as having no relation to any issue involved in this case.

The Court: Overruled.

A. I didn't know that I was short grain, no, sir.

Q. You did know that you were using the money of the corporation for a purpose for which the corporation was not formed, did you not?

Mr. Blaes: To which we object, Your Honor. We are still staying on a collateral matter here. This man is not being charged with any financial irregularities. It is a matter of whether or not he converted grain from Commodity Credit Corporation.

The Court: Yes, sustained."

I have heard the testimony that from the time we first signed the contract with Commodity Credit Corporation that we didn't have enough grain in our warehouse to satisfy the demands of Commodity Credit Corporation and the other persons who held warehouse receipts. I would say that their computation is probably correct. I know now that we were either short or out of position.

"Q. Now during that period you wrote a check upon the corporation for $24,500.00 for the purchase or construction of a home for yourself, didn't you?

Mr. Blaes: To which we object, Your Honor, as having no relation to any issue involved in this case.

The Court: Overruled. He may answer."

94 The check wasn't only for a home, there was other property with it. The check is marked "For residence and East Fulton property".

"Mr. Gallagher: I offer this, may it please the Court as our Exhibit Number 88.

Mr. Blaes: To which we object, Your Honor, for the reason it has no relation to any issue involved in this prosecution; it is improper cross examination. The defendant does not stand charged here with any irregularity in financial transactions but only with the matter of converting grain in the Commodity Credit Corporation.

The Court: Overruled. It will be admitted."

Check Number 4887 of Garden Grain and Seed Company was written in January, 1950. It was really for the corporation for a plot of ground down by the elevator at Pierceville. Title was taken either in the partnership or me, I am not positive. It wasn't made originally to the corporation, it was later transferred.

"Q. Under compulsion, was it not?

Mr. Blaes: Now, Your Honor, we are getting into an entirely collateral matter. I object to this line of questioning. It has no relation to any issue in this case.

Mr. Gallagher: Now, Your Honor, the witness is attempting to give the impression that the property was transferred back to the corporation voluntarily.

Mr. Blaes: You have got your right to try to impeach him.

Mr. Gallagher: I am asking him whether or not, as a matter of fact, it was not transferred back because the transfer was compelled.

The Court: Overruled. He may answer.

A. No, sir, it was not compelled. I was glad to send it back to them. In fact, I showed it to them and—

Q. That was after the appointment of the trustee or receiver, was it not?—A. I think it was, but I don't think I had even paid any attention to it before then.

95 Mr. Gallagher: May I ask that this check be marked? I offer this check in evidence.

Mr. Blaes: To which we make the same objections that we have heretofore entered in connection with Exhibits Numbers 87 and 88, I believe they were.

The Court: Overruled. It will be admitted."

I know a Mr. W. C. Aldridge. I believe he was a contractor and he did work on the house on the Ninth Street, also at 702 East Fulton, and I believe some on the Swift Building. The check shown me for $2,000.00 to Mr. Aldridge marked "On house" at the bottom was for the purpose of improving my home.

"Mr. Gallagher: May this be numbered, please, Your Honor?

The Clerk: It is marked Number 91.

Mr. Gallagher: We offer in evidence, may it please Your Honor, our Exhibit Number 91.

Mr. Blaes: To which we object, Your Honor, for the same reasons heretofore stated with Exhibits Numbers 87 and 88."

(The objection was overruled.)

Before going into the warehouse business, I had been in the ice cream business at Garden City. What you are now showing me is a letter sent by Mr. Frank Jackson, June 29, 1948, claiming some money. It is addressed to Marteney and Farmer, c/o Delmar Store, which is the place where we had the ice cream business.

"Q. Yes. Now sometime in 1950, when you were in the seed business and the warehouse business, you undertook to pay that balance there out of the funds of the Garden Grain and Seed Company at a time when you were short of Grain to answer the requirements of the warehouse receipts held by the Commodity Credit Corporation and by other warehouse receipt holders.

96 Mr. Blaes: To which we object as being wholly irrelevant and immaterial to any issue involved in this case * * *

The Court: Overruled. This is cross examination."

The record shows that we issued a check for $739.60 on July 11, 1950, to Jackson Ice Cream Company and on the 10th of October 1950, we paid off the balance of a note of $2,283.51.

"Q. Now that was no obligation of the warehouse company, was it?

Mr. Blaes: To which we object, Your Honor, as being entirely unrelated to anything here involved.

The Court: Overruled.

A. I don't think that this had any connection with the warehouse.

Q. That is right.

Mr. Gallagher: May it please, Your Honor, I offer in evidence these documents. There is a copy of the bill identified by the witness and it is offered as Exhibit 92, a copy of the note is offered as 93, a copy of the check of $739.60 is offered as 94, and we offer the check for $2,283.51 as Exhibit Number 95.

The Court: Let counsel see them.

Mr. Gallagher: Yes, Your Honor.

Mr. Blaes: To all of which, Your Honor, we object for the same reasons heretofore stated with reference to Exhibits 87 and 88.

The Court: Overruled. They will be admitted."

Scott Farmer at one time owned the entire corner at 702 East Fulton Street. We purchased it with the Garden Grain and Seed Company's funds. We finally paid for it on the 26th day of January 1951, with a check for $6,000.00 on the company account. I think that the title at that time was made out in our name, that is, my wife's and me.

97 "Mr. Gallagher: I offer those checks in evidence, may it please Your Honor.

The Clerk: 96 and 97.

Mr. Gallagher: 96 and 97, check for $500.00 is Number 96 and the check for $6,000.00 is Number 97.

Mr. Blaes: To which we make the same objections heretofore made with reference to Exhibits Numbers 87 and 88. Your Honor, that is a good example of the great number of collateral transactions we get into when we get into the financial affairs rather than the issues involved here, namely, the conversion of grain.

The Court: Overruled. They will be admitted.

Q. Now in July, 1950, and through October of 1950, and from, specifically from the 6th day of July through the 27th day of October, you owed personal bill, you and your wife owed a personal bill to the store, the Pegues-Wright Company, right, which I believe is at Hutchinson, Kansas; is that right?—A. Yes, I believe that is Pegues and Wright, sir.

Q. And on July the 3rd and on October the 18th, you procured your wife's or directed your wife to draw checks of the Garden Grain and Seed Company to pay on that account?

Mr. Blaes: To which we object, Your Honor, because it is wholly unrelated to any transaction in issue in the present prosecution.

The Court: Overruled."

The check you are showing me dated July 3, 1950, was issued at my direction and paid on the account in the store, and on October 18, 1950, there was a check in the sum of $2,000.00 with the same description.

98 "Mr. Gallagher: Will you mark these, please?

The Clerk: 98 and 99.

Mr. Gallagher: For the record, may it please Your Honor, the check in the amount of $2,000.00 is our Exhibit Number 98 and the check for $1,827.00 is Number 99.

The Court: Let counsel see them.

Mr. Blaes: To which we object, Your Honor, for the

same reasons heretofore given for Exhibits Numbers 87 and 88.

The Court: Overruled. They will be admitted.

Q. Now, Mr. Marteney, I suppose you were not aware that the laws of the state of Kansas forbade the loans of money by corporations to any officer or directors of the corporation, is that true?—A. Yes, I am aware of it now.

Q. When were you first aware of it?—A. I don't think until all these questions came up, sir, that I knew it.

Q. You mean sometime in January or February of 1942?—A. No, 1952.

Q. I mean 1952, I beg your pardon. You didn't know there was a section in the Kansas Code, Title 17, Article 31, Section 3006, entitled Corporations cannot make loans to officers or directors—

Mr. Blaes: To which we object, Your Honor, for the same reason; that the matter is wholly collateral to any issue here involved.

Mr. Gallagher: May it please Your Honor, this is one of the things that the defendant was bound to know.

Mr. Blaes: Every person is bound to know the law, but that is not all we are trying.

The Court: Approach the bench.

(The Court and counsel confer at the Bar of the Court out of hearing of the Jury and the Court Reporter.)

Mr. Gallagher: I will withdraw the offer at this point, may it please Your Honor.

99 The Court: All right.

Mr. Gallagher: May it please Your Honor, at this time I offer in evidence Exhibits marked as 87 and 88—86 and 87.

Mr. Blaes: We object. They are already in the record.

The Court: The objection is overruled. They will be admitted."

* * * * *

"Q. Did you have any bills of sale for any grain that you

had stored any place else?—A. I think that you will find some in the records, sir.

Q. Did you have them?—A. I never personally had them, no, sir.

Q. Did anybody have them at your place of business?—A. They would have to have had, sir, or we couldn't have shipped the car.

Q. They would have had them if you bought any grain and you were entitled to it. I want to know if there were any there. Don't you understand?—A. I don't believe I do. I certainly must not.

Q. How long have you been in the grain business?—A. Well, I have been connected with it since 1949.

Q. You were in it long enough to lose over half a million dollars of other people's grain.

Mr. Blaes: To which we object, Your Honor, as being highly argumentative, improper and unethical on the part of counsel.

The Court: Sustained. The Jury will be instructed to disregard it.

Mr. Gallagher: I will reframe the question.

Q. You did find out after the end of your career as an elevator man that you were short in grain up to over $400,000.00 worth, didn't you?—A. Yes, I have found out since we were short grain.

Q. Is that what you were going to give Commodity
100 Credit Corporation?—A. No.

Q. Whatever you could buy by scraping together some more loans and more money; is that what you were going to give them?—A. No, I think I stated that I had talked to the bankers about borrowing money for that.

Q. Let's not go into that. You even went, you even took money from a distillery company—

Mr. Blaes: Is that a question or an accusation?

Mr. Gallagher: Wait until I finish.

Q. You took money from a distillery company on drafts that they sent you for the shipment of grain that you never shipped them, did you not?

Mr. Blaes: To which we object, Your Honor, as being entirely a collateral matter. It will require us to go into the whole transaction to attempt to disprove it. It has no relationship to any charge in the indictment.

Mr. Gallagher: The warehouse receipts which were issued in the distillery company, may it please Your Honor, are bona fide receipts. They were issued for a valuable consideration, cash consideration.

The Court: Overruled. I will permit him to answer.

A. We received money from them for warehouse receipts.
Q. Yes. And how much money did you receive?—A. I couldn't give you the total amount, sir.
Q. Why not?—A. I don't know it.
Q. Was it $200,000.00; $300,000.00?—A. I think that is repetition. I think you have gone into that.

Mr. Gallagher: I never got an answer, may it please Your Honor.

The Court: Yes, I think he said around $225,000.00."

101 We got paid every cent that was due us on the warehouse receipts that we sold Central States Corporation. It was for over 14,000,000 pounds of grain. They were issued as late as December 15, 1951. Some of the grain was delivered to them. If the records show that it was 5,000,000 pounds that was delivered to them, I would say that was correct. I don't know how many pounds there were. I didn't handle it myself although it was under my supervision and direction.

Redirect Examination.

102 I had a personal account on the books of the company ever since the company was organized, and it always showed a balance in my favor.

Exhibit E is a ledger sheet showing the loans due to the stockholders by the company. I received from the accountants a breakdown of my proportionate part of that account. It is Exhibit F and it shows that my account on the books of the company was $20,581.81.

It is true that at various times items were bought that

belonged to me personally. I understood that they were being charged against my personal account. Exhibit G is a ledger sheet marked "Accounts Receivable, Marteney". The use of that account was to record transactions that were my personal obligations.

Exhibit No. 99, being the check in the sum of $1,827.43 made payable to Pegues-Wright Company, was entered against my personal account and appears on Exhibit G. Exhibit No. 94, being the check to Jackson Ice Cream Company, is shown as charged to the same personal account against me. The same is true of Exhibit No. 91, being the check to W. C. Aldridge in the sum of $2,000.00 for improvements on my home. The same is true of Exhibit No. 96, being the check written in favor of Pegues-Wright Company in the sum of $2,000.00.

The check for $24,500.00, Exhibit No. 88, paid for both our house and for the property next to the business downtown. I know how it was divided. $16,500.00 was charged for the house and the balance on the property downtown. The $16,500 was charged against my personal account. It appears on the ledger sheet, Exhibit E, as a debit on the 31st day of December in the sum of $16,500.00.

There were other items accruing to my credit from the corporation. One large one was rent. Another was the sum of $5,000.00 a year.

Excerpts from Argument to Jury by Mr. Gallagher, Counsel for Plaintiff.

" . . . . Do you remember the Couch check, a $500.00 check for the race horse? Do you remember the play that he made looking up to see if he could see the date it was cashed and admitting finally it was paid over to Couch four days
103 after the race horse had been bought and he was paying his share for the race horse?

Mr. Blaes: Your Honor, I am going to object to any argument here that is not supported reasonably by some inference from the testimony. There isn't a word of testimony that he admitted that that was for any race horse.

Mr. Gallagher: I submit that he did, Your Honor.

The Court: It is my recollection that he did, Mr. Blaes. I could be mistaken about it.

Mr. Blaes: I am sorry Your Honor doesn't recall it the same way. I would have to challenge the record and if Your Honor recalls it that way I will withdraw the objection.

Mr. Gallagher: And he admitted that he had been in on the purchase of the race horse at or about that time. But he only admitted those things when he found out that we had the information to prove it. Because he had written on the check in his own handwriting these figures: "329 bushels of grain". Which way was the wind blowing then? That was Garden Grain and Storage Company's check. Which way was the wind blowing then? Any person that was a judge of character that saw that transaction go through could have almost prophesied at that time that Marteney would wind up before a jury in a criminal court some time in the future. That check was in evidence here, Exhibit Number 96. Number 97, a $2,500.00 check to the same Couch. Garden Grain and Storage Company check. Which way was the wind blowing then? Did he tell you, did he dare tell you, that those checks were used for any purpose or interest of the Garden Grain Company? Not even Marteney, not even Marteney. He might have been able to forget what they were used for but he wouldn't have dared say that he had used them for the Garden Grain and Seed Company, because if he had he would have grabbed the ball and run with it and it is not because he has got such a bad memory either. What else did he do with
104 some money? Exhibit Number 98, $24,330.00 to buy a home; Garden Grain and Seed Company check. On the 27th day of January, 1950, Exhibit Number 99, $1,600.00 cut for work on his home, according to him. On the 12th day of July, 1950, $7,126.00 for 27 head of steers. For who? Marteney and Henderson.

Mr. Blaes: Now, Your Honor, again I have to object to going beyond the record. Every word of evidence about that check was that that was for the corporation, that the corporation got every dollar out of it.

Mr. Gallagher: The testimony was exactly this, may it please Your Honor: It was that it was bought, the steers were bought with other capital in the name of Marteney and Henderson; that they were afterwards, after the sale and after the appointment of the receiver they made good to the corporation the amount that they had realized. I leave that your gentlemen—

Mr. Blaes: That was what Mr. Gallagher tried to get him to say and Mr. Marteney insisted that that absolutely was not true; that they bought for the corporation and that the corporation was in the cattle business at that time.

The Court: I think that was Mr. Marteney's testimony.

Mr. Gallagher: May it please Your Honor, I will not put my recollection up against yours, but mine was distinctly the other way.

The Court: I could be mistaken. I have been a good many times.

Mr. Gallagher: So I will have to leave it to the Jury.

Payment of $2,000.00 to a man named Aldridge, as I recall it, for working on his home. To Scott Farmer on the 12th of September, 1950, Exhibit 96, $500.00 down payment on a contract to buy a piece of real estate on East Fulton Street in Garden City. Title where? In the name of the corporation? No. With the corporation money? Yes. July 3rd, 1950, $1,827.00 to a department store in Hutchinson, Kansas. On the 18th day of October, three months later, $2,000.00 making a total of $3,800.00, $3,827.00 paid to a department store on personal bills. Not one penny for the corporation, but paid with corporation checks. Balance of purchase on the East Fulton Street house, paid through the bank there with the corporation check, Exhibit Number 97, $6,000.00. A total between July and January of $45,815.42.

105 This man has a terrible memory. He has been demonstrated now to have a loose regard, to say the least, for money belonging to the corporation. And where did it come from? Well, it might have come from that big check Commodity Credit gave him for storage. It might have come from the sale of farmers' grain and Commodity Credit grain, because he was selling it back there hand over fist,

but you can bet your bottom dollar it wasn't his money; it wasn't his money, and he was spending it for purposes for which it was not intended, which he had no right to do. And he falls back on this evasion, lack of memory, and what a gentle act he put on there as he sat in the witness box, the delicate way he talked—why he wouldn't harm a fly. The little sip of water he took when his throat tickled him, and then he got down into his story with heart and soul and under the leadership—I withdraw that. Under the assistance of his counsel, smoothly and rapidly ran the story. Was he asked one question he didn't forget or that he had forgotten the answer to? No. He knew the answer like that (indicating). It sounded like this radio performance—he could have won a prize—and then he changed gears on cross examination and he fuddled and he blundered and he hemmed and he hawed and he couldn't even see the date punched through the check, the race horse check, couldn't see that. One would have thought he had lost completely all of the education he had since he was back in the fourth grade, although I think a fourth grader could have given a better performance, or a more sincere performance, and you compare that with the way he latched onto, if I may use a colloquialism, he latched onto that Atchison, Topeka and Santa Fe waybill. Well, he was poor when he started and he got rich quick. He got $229,000.00 from Strong, just in the transactions that you heard described here by the witness who came up here and told you about the payments.

106 What happened to that money? Ask him. I asked him and I failed to get an answer as I failed to get an answer and you know what he was doing with it. He was not only converting the grain owned by the Commodity Credit Corporation together with these other depositors of grain there; he was converting the proceeds; he was not only stealing the grain, he was stealing the money afterwards.

Certificate of the Absence of Evidence.

107 1. There was no evidence of any specific grain owned by Commodity Credit Corporation, as distinguished from grain in the commingled mass of grain in the warehouse, being stolen or converted.

2. There was no evidence that any of the grain allegedly stolen or converted on any specific count actually came out of the commingled mass of grain in the warehouse.

3. There was no evidence that the defendant had any personal connection with the shipment of the grain on any specific count.

4. In the direct examination of the defendant Wayne S. Marteney, there was no testimony offered relating to any cash transactions of the Garden Grain and Seed Company as distinguished from evidence pertaining to shipments of grain.

Filed June 11, 1954.

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Requested Instruction 2.

16 You are instructed that the word "willful", "willfully", or "willfulness" as used in connection with the Statute under which the defendant has been indicted, or when such words appear in these Instructions, refers to the intention in the doing of the forbidden act. It means that such act was done knowingly, voluntarily, deliberately, with knowledge that the act was a wrongful act, and with the specific intention of taking the property of the Commodity Credit Corporation and depriving the Commodity Credit Corporation of such property. Before an act can be considered as having been willful, as that word or its variations are used here, such act must have been committed malevolently, with a bad purpose, or an evil mind.

In this connection, you are instructed that such willfulness is an essential element of every count of the Indictment separately, and as to any particular count of the Indictment before there can be a conviction of the defendant under such count, you must be convinced of such willfulness in the committing of the act charged in such count beyond a reasonable doubt. If you are not so convinced, you should acquit the defendant as to such count.

Hargrove v. U.S., 67 F.2d 820, 90 A.L.R. 1276.

Morissette vs. U.S., 342 U.S. 246, 72 S. Ct. 240, 96 L.Ed. 288,
Hubbard vs. U.S., 79 F.2d 850,
Screws vs. U.S., 325 U.S. 91, 65 S. Ct. 1031, 89 L.Ed. 1495,
Nabob Oil Co. vs. U.S., (Tenth Circuit) 190 F.2d 478,
Wilton vs. U.S., 156 F.2d 433,
Kempe vs. U.S., 151 F.2d 680.

Instruction No. 4.

18 The offenses charged in the various Counts of the Indictment could not be proven unless it were shown beyond a reasonable doubt that the grain described in each Count was the property of the Commodity Credit Corporation. In this connection, there is no showing that Commodity Credit Corporation had any ownership to any grain except such as had been commingled in the stored grain in the warehouses. With reference to the grain described in Count 23 of the Indictment, there is some evidence that such grain was never so commingled and never became a part of any grain in which Commodity Credit Corporation had any interest. Furthermore, the defendant states that there is no way of knowing whether any of the shipments described in Counts 1 to 22, inclusive, and Counts 24 to 28, inclusive, came out of the stored grain in the warehouse. If, in the light of all of the evidence, you have a reasonable doubt whether the particular grain referred to in a given Count, or any number of given Counts, of the Indictment came out of the stored grain in the warehouses, you must resolve such reasonable doubt in favor of the defendant and acquit him on such Count or Counts.

[Charge to Jury.]

The Court: Ladies and Gentlemen of the Jury:

20 It is now my duty to charge you as to the law which will govern you in your deliberations in the jury room and it is your duty to take the law precisely as given to you in these instructions, regardless of whether or not it comports with your idea of what the law is or should be.

In this connection a word of caution may not be out of place. Sometimes one or more jurors may get an erroneous

impression of what the law is from something the Court has said in ruling upon objections or asking questions of counsel or witnesses. I instruct you, therefore, to put any such impressions wholly out of your mind and to accept this charge as being, as it is intended to be, a statement of the rules of law by which you are to be guided in arriving at your verdict. I also charge you to lay to one side and wholly to ignore any opinion which you may think the Court entertains upon any fact except as you may be specifically instructed otherwise in this charge; for, as you will learn from the instructions, you are the exclusive judges of the facts of the case.

As I advised you in the beginning, and as counsel has told you, the Indictment returned by the grand jury contains twenty-nine counts. I am not going to take the time to read each of those counts to you. I will read the first count, however.

Count One: On or about December 21, 1951, in the District of Kansas, the Defendant, Wayne S. Marteney, did unlawfully steal, conceal, remove, dispose of and convert to own use, and to that of the Garden Grain and Seed
21 Company, Inc., Garden City, Kansas, approximately 9,164 pounds of grain sorghum, which said grain was then and there property owned by Commodity Credit Corporation, an agency and instrumentality of the United States.

Now each of the other twenty-eight counts of the indictment charge a similar kind of offense, the difference being, of course, in the date of the alleged offense in each instance. The Second Count, the date of the offense alleged is December 18th; the Third Count, December 17th, 1951; the Fourth Count, December 15th; the Fifth Count, December 13th; the Sixth Count, December 12th; the Seventh Count, December 11th; the Eighth Count, December 10th; the Ninth Count, November 19th; the Tenth Count, November 20th; the Eleventh Count, November 17th; Count Twelve, November 15; Count 13, November 14th; Count Fourteen, November 13; Count Fifteen, November 12; Count Sixteen, November 10th; Count Seventeen, November 9; Count Eighteen, November 8th; Count Nineteen, November 3; Count

Twenty, November 1; Count Twenty-one, October 31st; Count Twenty-two, October 26; Count Twenty-three, October 25th; Count Twenty-four, October 22nd; Count 25, October 16th; Count 26, October 11th; Count 27, October 9th; Count 28, September 11th, and Count 29, beginning from on or about April 1, 1950, to and including September 10, 1951.

22 Now to the charge contained in each of the counts of the indictment the defendant has entered a plea of not guilty. This plea puts in issue every material ingredient of the crime charged in the indictment and makes it incumbent upon the United States to establish by the evidence to your satisfaction, beyond a reasonable doubt, as such term will hereinafter be defined, every material allegation of the indictment.

This is because every defendant in a criminal case is presumed to be innocent of the crime charged until proven guilty by the evidence beyond a reasonable doubt.

Number 4. The indictment in a criminal case constitutes the formal charge. It merely indicates that the requisite number of grand jurors, upon the evidence presented to them, had determined there was some evidence a crime had been committed for which the defendant should be placed upon trial. But the fact that an indictment has been returned and the defendant has been placed upon trial, raises no presumption against him. It is a mere charge or accusation—nothing more and nothing less. You will be instructed more fully later as to the proof required and the presumptions which do arise. It is appropriate to instruct you specifically at this point, however, that the charge, together with the fact that the defendant has been arrested and placed upon trial, neither separately nor together, con-
23 stitute any evidence of his guilt.

Number 5. A reasonable doubt, you are instructed, is one that has some reason for its basis, and it exists in that state of the case which, after a full consideration of all of the evidence under the instructions, leaves your mind in that condition that you cannot say that you feel an abiding conviction of the guilt of the defendant. Such doubt should arise after a candid and impartial consideration of all of the evidence in the case, but it may be induced either by

evidence produced in the trial, or by reason of lack of evidence to prove the defendant guilty of the crimes charged in the indictment.

Number 6. You are instructed that the Statute under which the indictment in this case was brought provides as follows:

"Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

You are further instructed that the elements of the offenses prescribed by this Statute are:

24 (1) That the act complained of be willfull.

(2) That the property stolen, concealed, removed, disposed of, or converted, be the property of the Commodity Credit Corporation; and

(3) That the stealing, concealment, removal, disposal of, or conversion of such property be to the defendant's own use or to the use of another person or corporation.

Number 7. The Indictment under which the defendant is charged in the present case makes the accusation that the defendant did steal, conceal, remove, dispose of, and convert to his own use and to that of the Garden Grain and Seed Company, Inc., property owned by Commodity Credit Corporation.

The word "steal" as used in the Indictment and in these instructions means to take away from one in lawful possession property without the right to take and with the intention to keep such property wrongfully. To steal is the same as to take and carry away any personal property of another without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to apply it to the use of the taker or some other person.

The phrase "conceal, remove, dispose of, or convert" is intended to mean what is usually referred to simply as the

converting of property of another to the use of the accused or to some other person. To constitute a conversion
25 there must be a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or interest therein, or in derrogation, exclusion, or defiance of, such title or rights. A conversion takes place where a person does such act in reference to the personal property of another as amounts to the appropriation of the property to himself. The simple conversion of property, though wrongful, does not ordinarily amount to a crime. In the present case, whether or not conversion amounts to a crime depends upon the intention with which the conversion is committed. For such a conversion to be a crime, even though it is a wrongful conversion, it is a necessary ingredient that it be a willfull conversion as hereinafter defined, and unless the Jury should find beyond a reasonable doubt that a conversion had been committed, as charged in the Indictment, and that in addition thereto, such conversion was a willfull conversion, it would be the duty of the jury to acquit the defendant on any count with reference to which such doubt exists.

Number 8. You are instructed that the Commodity Credit Corporation is an agency and instrumentality of the United States, and that whoever willfully conceals, removes, disposes of, or converts to his own use or to the use of another person or corporation, any property owned, held by, or mortgaged or pledged to the Commodity Credit Corporation, is guilty of a crime against the United States. And
26 you are further instructed that this statute applies to ownership of an undivided interest in property as well as to sole interest therein.

Number 9. The word "willfully" as used in this Statute means "intentionally" or "with the purpose of." It is an attitude of mind and will and carries with it the thought of intentional ignoring of the law, or an indifference to its provisions.

In order that you may find that the defendant stole, concealed, removed, disposed of, or converted to his own use, or to the use of the Garden Grain and Seed Company, Inc., as charged in any count in the indictment, you must find

that his actions were willfull and intentional as distinguished from inadvertence and mistake. A person, ordinarily, is presumed to intend what he does. You are instructed that the law presumes that every man intends the natural and probable consequences of his own acts; and intent may be presumed if it is shown that such acts were done with the purpose of ignoring the law, or that such acts were done with an indifference to the provisions of the law. The evidence of intent may be shown by the actions of the defendant and the actual circumstances, as well as by direct evidence. It is impossible to enter into the mind of the defendant and determine the intent with which he acted, or the purpose he had, or the knowledge he possessed. Therefore, it
27 is proper for you to determine the knowledge and intent he had and his purpose from all the evidence and all the facts and circumstances shown by the evidence.

Number 10. The jury is further instructed that the ownership and interest of the Commodity Credit Corporation in grain sorghum for which it held warehouse receipts, stored in the warehouse or warehouses issuing such receipts, are fixed and determined by the contracts entered into between the Commodity Credit Corporation and the warehouseman issuing such warehouse receipts. The Court instructs you as a matter of law that by the terms of such contracts the Garden Grain and Seed Company, Inc., was bound by the following provision of the contract:

"7. Obligation to Maintain Stocks in Warehouse: (a) with respect to the grain stored commingled, the warehouseman shall at all times maintain in the warehouse indicated on the warehouse receipts and in which the grain was originally deposited for storage a stock of grain of the quantity, class, grade, and quality which he is obligated to deliver under the warehouse receipts."

And the defendant, Wayne S. Marteney, as an officer, agent, and General Manager of the Garden Grain and Seed Company, Inc., was bound by law to see to the enforcement of this contract.

Number 11. If you are satisfied beyond a reasonable doubt that the defendant, Wayne S. Marteney, acting as aforesaid, stole, concealed, removed, disposed of, or con-

verted grain sorghum of the United States, as defined by the Court, on or about the dates alleged in the indictment, it is not necessary for the Government to prove the exact amount so alleged; but if any part of such amount has been so stolen, concealed, removed, disposed of, or converted, that is sufficient.

It is not necessary, in order for the defendant to be guilty of the offense charged, that he should have himself personally stolen, concealed, removed, disposed of, or converted to his own use or to the use of any other person or corporation, all or any part of the grain described in each count of the indictment; but it is sufficient if the defendant caused the same to be done through agents, servants or employees.

Number 12. If the proof shows to your satisfaction, beyond a reasonable doubt, that the defendant intended to convert grain regardless of its ownership, and with such intent did in fact convert grain in which the Commodity Credit Corporation had an undivided interest, proof of such intent and such conversion is sufficient.

Number 13. The defendant states that on the occasions of the various transactions set forth in the Counts of the Indictment that he at all times believed in good faith
29 that his company had the grain with which to meet its obligations to Commodity Credit Corporation in its own warehouse, or if not in its own warehouse, then it still had the grain even though it may have been "out of position," that is, physically located in places other than the company's own warehouses, and that he had the right to use grain from such other places to meet his obligations to Commodity Credit Corporation, and that he had the right to purchase the interest of Commodity Credit Corporation in any grain and the means with which to do so. If, from his explanation and all of the evidence, you are left in a state of reasonable doubt as to his guilt, as defined in these instructions, on all, some, or any of the Counts, then you should resolve such doubt by a verdict of not guilty, as to all Counts if your doubt goes to all of the transactions alleged in the Indictment, or if your doubt goes to some but not all of the transactions in question, then you will resolve such doubt by a verdict of not guilty only on whatever Count or Counts come within the scope of your said doubt.

Number 14. The defendant testified that he had no actual personal connection with the physical acts of loading up and shipping out the grain described in Counts 1 to 28, inclusive, of the Indictment, and that his only connection with them consisted of making the contracts of sale or of authorizing other persons to make the contracts
30 of sale. It appears from the evidence that various shipments consisted of two or more carloads under the same contract of sale or purchase order. You are instructed that there can be only one offense of the kind set forth in the Counts of the Indictment for each act of the defendant himself. If the act of the defendant which you find under these Instructions to have constituted an offense consisted of a single act, as for instance, effecting or authorizing the sale or shipment of the grain, and the actual work of effecting the shipment was executed by other persons who caused the grain to be split up into separate cars, with which splitting up the defendant had no personal participation, then the defendant could not be guilty of more than one offense in connection with such single contract of sale regardless of the number of cars into which it was placed for shipment.

Number 15. Section 2 of Title 18 of the United States Code reads as follows:

"Principals

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

"(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

31 Number 16. The term "circumstantial evidence" refers to evidence adduced from circumstances. It is the duty of the jury to convict upon circumstantial evidence as well as direct evidence if it is so strong and convincing as to prove the guilt of a defendant beyond a reasonable doubt. When an issue in a criminal case rests wholly upon circumstantial evidence the facts and circumstances relied upon to establish it should be consistent with each other,

consistent with the guilt of the defendant, and wholly inconsistent with any other reasonable theory. It must be so strong and convincing as to exclude any reasonable ground for believing the accused to be innocent and then only does it meet the requirement of proving his guilt beyond a reasonable doubt.

When the evidence is partly direct and partly circumstantial, then all of it taken together must be so strong and convincing as to exclude every reasonable theory and hypothesis of the innocence of the accused. For, as stated earlier in this charge, mere suspicion or conjecture is not sufficient to convict but you must be satisfied of the guilt of the defendant beyond a reasonable doubt.

Number 17. You are the exclusive judges of the facts proven, the weight of the evidence and the credibility of the witnesses. In determining the issues in this case you will, of course, rely upon the evidence which you have heard in the court room and will not be swayed by sympathy, passion or prejudice. You may and should, however, take
32 into consideration and bring to your assistance the general information which you possess as to matters of common knowledge, observation and experience of life. In weighing the testimony of the witnesses you have a right to consider their appearance and manner while testifying, their means of knowledge, apparent intelligence or ignorance, interest or want of interest in the outcome of the case and all other facts and circumstances appearing on the trial which will aid you in arriving at the truth. If you believe that any witness has wilfully testified falsely as to any material fact you may disregard the whole or any part of his testimony; but you are not bound to believe or disbelieve all of the testimony of any witness. Conflicting testimony, if any there be, should be reconciled with truthfulness, if reasonably possible; but if you cannot do so then you must use your best judgment in determining what testimony you will believe.

Number 18. It is appropriate to reiterate that this case must be decided by you without regard to sympathy, passion or prejudice, for or against the Government or the defendant, or any one having anything to do with the case.

The attitude of jurors at the outset of their deliberations is
a matter of considerable importance. It is rarely pro-
33 ductive of good for a juror, upon entering the jury
room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset his sense of pride may be aroused and he may hesitate to recede from an announced position if and when shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to this court room, not in the opinions any of you may hold as you retire to commence your deliberations. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your own individual judgment. To each of you I would say that you must decide the case yourself but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the
single fact that a majority of the jurors, or any of
34 them, favor such a decision. In other words, you
should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Now when you retire to your jury room you will select one of your number to be your foreman. He will preside over your deliberations and he will sign your verdict. When you have arrived at one, and that verdict, of course, must be a unanimous one.

Now the Court has prepared a form of a verdict pertaining to each of the 29 counts. I will read a part of it,

enough so that you will understand it. "We, the jury in the above entitled cause, duly empaneled and sworn upon our oaths find the defendant" then as to each count in, in front are the words "guilty" and "not guilty." Then following that "as charged in count one of the indictment herein." Now, as an example, on that count, if it is your desire or your verdict that you find him not guilty you would scratch out the word "guilty" and leave the words "not guilty." If it is your verdict that you find him guilty on that count you would scratch out the words "not guilty" and leave the word "guilty." Now I am sure that after you look at this form of verdict that you will understand it.

Filed Feb. 27, 1953.

Summarization of Defendant's Objections to Court's Charge to Jury.

108 The Appellant has prepared a summarization of objections to the Court's charge, all of which were made before the Jury retired to deliberate. The same are attached hereto.

A. Lavon Gwynn,
Eugene A. Blaine,
Ransom, Jorgensen,
Counsel for Appellant.

Summarization of Defendant's Objection to Court's Charge to Jury.

Instruction No. 6

109 (The portion of the Court's charge designated as Instruction No. 6 was identical with the Government's request for Charge No. 1, to which the Defendant entered an objection upon the record.)

Mr. Blaine: The defense would object to the last sentence of instruction Number 2, commencing with the words "You are further instructed that this statute applies to ownership of an undivided interest", for the reason that the statute does not apply to an undivided interest in property held pursuant to the warehouse act of the State of Kansas. The

statute by its terms applies to property which is the subject of actual title and ownership of the Commodity Credit Corporation directly in its own right. In the present instance we are talking about property in which there is a peculiar type of ownership, being an ownership as a tenant in common subject to the rights, duties and liabilities created as between tenants in common, as between all of the tenants in common and outside parties, all as delineated in the warehouse act.

(The defense also made the following objection.)

Mr. Blase: The defendant objects to Instruction Number 8 in that it purports to make the statute applicable to the peculiar type of ownership represented by the rights of a holder of a warehouse receipt in commingled grain under the warehouse receipts law; whereas, the statute actually does not apply to that kind of a situation at all.

Instruction No. 9.

(The portion of the Court's charge designated in Instruction No. 9 was identical with the Government's request for Charge No. 4, to which the Defendant entered an objection.)

110

Mr. Blase: The defendant would object very strenuously to all of Number 4 except the last three sentences thereof, commencing with the words, "The evidence of intent may be shown by the actions of the defendant," commencing at that point the instruction is unobjectionable, but the first part of the instruction is not a correct statement of wilfulness as applied to the present case.

(In addition thereto, the Defendant entered an objection to the charge at Tr. 967.)

The defendant objects to what the Court has called Instruction Number 9 because it mistates the law as to what constitutes wilfulness as applied to the present statute and the present indictment. It fails to require the defendant to have a specific intention to convert or to steal the property of Commodity Credit Corporation or to act with an evil intent, a bad mind, as is required under the law applicable to larcenous crimes and to felonies.

Instruction No. 10.

(The portion of the Court's charge designated as Instruction No. 10 was identical with the Government's request for Charge No. 3, to which an objection was
111 lodged.)

Mr. Blaes: The defendant objects to the entire instruction requested by the Government as Number 3 for the reason that it is an actual mistatement of the law applicable to the present case. The ownership and interest of Commodity Credit Corporation is determined by the law applicable to the Warehouse Act and is not depending upon the contract between the parties as is stated here. Furthermore, there is no purpose in stating to the Jury the wording here of a particular part of the contract between the Commodity Credit Corporation and the defendant. It is pointing out specifically a paragraph isolated from all the rest of the evidence and actually pointing out a paragraph which has no particular special relationship to any issue here.

The right and title of the Government does not depend upon the contracts between these parties nor is the law under which the defendant is being prosecuted dependent upon any contract. The statute is one having to do wholly and entirely with the alleged act of stealing or converting Government property and the contractual arrangement between the parties is of no consequence.

(The defendant again objected.)

The defendant objects to Instruction Number 10 because it purports to instruct the Jury that the rights of the Government in property involved in this case arises out of contract and purports to give the impression to the Jury that the violation of the contract constitutes an offense, whereas, under the law the right to the Government that must be proved before there can be an offense under this statute is a right based on title and ownership of property rather than any contractual rights based on the contract that has been included in the instructions and which the Jury is led to believe would provide the basis for an offense simply because the contract was breached.

Instruction No. 11.

112 (The portion of the Court's charge designated as Instruction No. 11 was identical with the Government's request for Charge No. 5. The defendant objected.)

Mr. Blaes: The defendant has no objection to the first paragraph of the requested instruction Number 5.

Now as to the second paragraph the instruction is objectionable from the standpoint that it says simply that if the defendant caused something to be done through an agent, servant, or employee, that he is guilty of the crime, which, of course, overlooks the entire ingredients of the wilfulness of the act before it can be an offense. I doubt whether counsel intend it to convey that effect, but that is what it actually does as worded here, and would be objectionable from that standpoint.

(Colloquy here is had off the record.)

The Court: Near the end of the last paragraph "or by any other means," I think probably that ought to be stricken out.

Mr. Gallagher: I think we can do that in this case. We are not relying on any other means.

The Court: With that portion stricken out I will give Number 5.

Mr. Blaes: At least, Your Honor, it ought to say in that last clause there "but it is sufficient if the defendant wilfully caused same to be done."

Instruction No. 12.

113 (The portion of the Court's charge designated as Instruction No. 12 was identical with the Government's request for Charge No. 6. The defendant objected at the time the Government presented the request.)

Mr. Blaes: Number 6, of course, is objected to by the defendant for the reasons heretofore stated in connection with the Government's requested instruction Number 4.

(The instruction was again objected to.)

The defendant objects to Instruction Number 12 for the reason that it also misstates the law applicable to what constitutes a wilfull conversion and in effect told the Jury that it was sufficient if they found beyond a reasonable doubt that some conversion had been committed without reference to whether or not it was conversion of the Government property or that of property of Commodity Credit Corporation, whereas, the statute requires that before the act amounts to an offense there must be the wilfull conversion of property of Commodity Credit Corporation which, under the statute, means that the defendant would have to know and intend that he was converting the property of, specifically, Commodity Credit Corporation.

(The record shows that on the next day the following proceedings took place out of the hearing of the Jury.)

The Court: For the benefit of counsel, let me say that last night when we let the Jury go home for the night the foreman of the Jury handed the Clerk the note which I hold here in my hand and which I will give to the Clerk and direct that it be filed in the case, and in this note the Jury requests that certain instructions be re-read to them. Therefore, I have concluded this morning that I will give to the Jury a transcript prepared by the Reporter of the instructions as the Court gave them at the conclusion of arguments by counsel. All right now, Mr. Blaes.

Mr. Blaes: The defendant would have no objection whatsoever from a procedural standpoint to the giving to the Jury of a transcript of the instructions given by the Court; however, the defendant objected to the original charges given by the Court and earnestly feels that the charge is erroneous and prejudicial to the rights of the defendant. Accordingly, the defendant believes now that he must renew his objection to the giving of the instructions in writing to the Jury for the reason that it would be, in effect, compounding the error and the defendant calls the attention of the Court to the fact that the error will be the more prejudicial because the Jury will have an actual written record of the Court's erroneous charge in the course of the Jury's deliberations. Accordingly, the defendant objects to providing the Jury with any such written transcript.

The Court: Well, the objection will be overruled and I will give to the Jury the transcript prepared by the Reporter.

(The Jury was then called into the Courtroom and provided with the copy prepared by the Reporter.)

Filed with proof of service, June 11, 1954.

Clerk's Certificate.

I, Harry M. Washington, Clerk of the United States District Court for the District of Kansas, do hereby certify the within and foregoing to be the original record and proceedings in Case No. 8887, Criminal, entitled United States of America, Plaintiff, v. Wayne S. Marteney, Defendant, in said court, as is called for in Defendant's Designation
119 of Record on Appeal on file herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District of Kansas, this 11th day of June, 1954.

HARRY M. WASHINGTON, Clerk.
By: LAURINE LEIDEL, Deputy.

(Seal.)

Filed United States Court of Appeals, Tenth Circuit, June 14, 1954, Robert B. Cartwright, Clerk.

FILED
JAN 31 1955
HAROLD B. WILLEY, Cl

In The
Supreme Court of the United States

OCTOBER TERM, 1954

No. [redacted]568

WAYNE S. MARTENEY,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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JANUARY, 1955.

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INDEX

	PAGE
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Argument	7
A. Conduct of Respondent's Counsel Was Reprehensible and Prejudicial	7
B. Introduction of Evidence on Collateral Matters Was Erroneous and Prejudicial	15
C. Court's Charge to Judy Contained Errors	21
1. Word "Wilfully" Wrongfully Defined	21
2. Court Erred Charging Jury on Effect of Contract	26
3. Court Erred Charging Jury on Effect of Agency	27
Conclusion	30
Appendix	
Authority:	
Berger v. United States, 295 U. S. 78, 69 L. Ed. 1314	14
22 C. J. S., Criminal Law, Page 1123, Sec. 691	21
Hargrove v. U. S., 67 F. 2d 820-823	22
Miller v. U. S., 120 F. 2d 968	29

PAGE

Morissette v. U. S., 342 U. S. 246; 72 S Ct. 240, 96 L. Ed. 288 24

Nabob Oil Co. v. U. S., 190 F 2d 478 23

Screws v. U. S., 325 U. S. 91; 89 L. Ed. 1495; 162 A. L. R. 1330; 65 S. Ct. 1031 29

Suhay v. U. S., 95 F. 2d 890 21

Union Pacific R. Co. v. Field, 137 F. 14 16

United States v. Murdock, 240 U. S. 389; 78 L. Ed. 381; 54 S. Ct. 223 22

United States Code:
15 U. S. C. 714(m) (c) 3

18 U. S. C. 2(b) 3, 28

Youman's v. U. S., 264 F. 425 20

In The
Supreme Court of the United States

OCTOBER TERM, 1954

No.

WAYNE S. MARTENEY,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on the 30th day of December, 1954, the same being based on an opinion of said court filed on the same date (Appendix), which opinion affirmed the judgment and order of the United States District Court for the District of Kansas. The

opinion is not yet officially reported or published. The order and judgment of the District Court is unreported (R. 11).

JURISDICTION

The judgment sought to be reviewed was entered on the 30th day of December, 1954. The statutory provision believed to confer jurisdiction to review the judgment by writ of certiorari is Section 1254(1) of Title 28, United States Code.

QUESTIONS PRESENTED

Whether the judgment of the court below so far sanctioned such a departure by the district court from the accepted and usual course of judicial proceeding as to constitute a serious deprivation of the rights of an accused, and as to call for an exercise of this Court's power of supervision when:

a. Counsel for the respondent was guilty of flagrant and unethical conduct in the trial of the case prejudicial to the petitioner.

b. Evidence on a mass of collateral matters was erroneously admitted at the trial and was highly prejudicial to the petitioner.

c. The court's charge to the jury contained several substantial errors, in particular:

i. By incorrectly defining the word "willfully."

ii. By misstating the effect of a contract controlling the petitioner's business operations.

iii. By incorrectly stating the effect of performance of an act through an agent.

STATUTES INVOLVED

The statute under which the petitioner was indicted was 15 U. S. C. 714(m) (c), the pertinent subsection of which reads as follows:

> "(c) Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the corporation (Commodity Credit Corporation), shall upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

The only other statutory provision here involved is 18 U. S. C. Section 2(b), reading as follows:

> "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

STATEMENT OF THE CASE

The petitioner, Wayne S. Marteney, was indicted in the District of Kansas on August 21, 1952, under 15 U. S. C. Section 714(m) (c), in twenty-nine counts alleging that he did steal, conceal, remove, dispose of and convert to his own use and that of the Garden Grain & Seed Company, Inc., a certain quantity of grain sorghum, specified in each count, which was owned by Commodity

Credit Corporation (R. 1). The defendant entered a plea of "not guilty" on all counts (R. 3).

Before the trial, the petitioner filed a motion to dismiss counts 1 to 28, inclusive, for the reason that no one of them charged an offense against him (R. 3). This motion was overruled but the Court of Appeals in its opinion obviously held that the motion was good, and that the judgment should be sustained only on the twenty-ninth count (Appendix).

The respondent attempted to prove the allegations of the indictment with evidence tending to show that various quantities of grain had been shipped from the warehouse of the Garden Grain & Seed Company, Inc., of which the petitioner was the manager, at a time when there was a shortage of grain in the warehouse (R. 14-17). The respondent also introduced evidence tending to show the percentage of ownership of Commodity Credit Corporation in the commingled mass of grain on the dates of the various shipments (R. 17), thereby attempting to show that a portion of the grain in each shipment was converted by the petitioner to his own use, or that of Garden Grain & Seed Company, Inc.

In the trial of the case, though every count of the indictment was limited strictly to the issue of whether the defendant had stolen or converted grain owned by Commodity Credit Corporation, the trial court permitted evidence to be introduced upon a multitude of purely

collateral matters involving the financial and other affairs of the Garden Grain & Seed Company, Inc., of which the petitioner was the general manager. Examples of such matters were evidence that Central States Cooperatives had purchased warehouse receipts on which it lost $280,000.00 because the grain did not get delivered before the collapse of the company (R. 27), that a check in the amount of $500.00 given to one Otto Cusch for some grain seed was in fact a payment upon a note borrow (R. 34), that a company check in the amount of $24,500.00 was partly applied on the purchase of a home for the petitioner (R. 41), that a check in the amount of $2,000.00 was paid by the company to apply upon repairs at the home (R. 42), that a check in the amount of $739.60 was written by the company to pay an old indebtedness in connection with a former business of the petitioner (R. 41), that a company check in the amount of $6,000.00 was used to purchase a piece of property, but the title to which was taken in the name of the petitioner and his wife jointly (R. 41), that the company records showed an account to a department store in Hutchinson, Kansas, which represented purchases made by the petitioner for himself and his children (R. 44), etc.

In the charge to the jury, the trial court instructed the jury that "willfulness" referred to an act distinguished as intentional rather than as inadvertent or mistaken, and that the intent of the doer of the act could be

presumed from his conduct (R. 57). The court refused to charge the jury that in a statute defining a felony as in the present case, "willfulness" required a specific and evil intention to do a wrongful act (R. 52). The court further charged the jury that the contract of the Garden Grain & Seed Company with Commodity Credit Corporation required the company to maintain in the warehouse enough grain to discharge all the warehouse receipts. The court then further charged the jury that it was the personal obligation of the petitioner "bound by law to see to the enforcement of this contract" (R. 58). There was no evidence that the petitioner personally had any connection with the shipment of the grain alleged in the various counts (R. 52), and the court purported to instruct the jury as to the effect of doing an act through an agent by reading to the jury Section 2 of Title 18, U. S. C., but in reading it, the court omitted the word "willfully" as used in the statute in committing an offense through an agent (R. 60).

The trial of the case by the special prosecutor representing the respondent was characterized by various forms of conduct which the petitioner claims were highly improper, unethical, and prejudicial to the rights of the petitioner. The outstanding example was the absolutely false statement made by the attorney that a certain check was, according to the records of the New York Jockey Club, given by the petitioner in payment of a

race horse with company funds rather than for grain feed as the check showed on its face (R. 7, 37).

ARGUMENT

A. Conduct of Respondent's Trial Counsel was Reprehensible and Highly Prejudicial to the Rights of the Petitioner.

The trial court permitted the prosecuting attorney trying the case to engage in various species of conduct that had the effect of prejudicing the petitioner's rights and inflaming the jury against him. In some instances when the court did caution the attorney that he was going beyond the bounds of propriety, the caution went unheeded and counsel even appeared to appeal directly to the jury notwithstanding the admonitions of the court.

By all odds, the most flagrant example of unethical conduct of the attorney was a race horse transaction. The pertinent portion of the testimony appears in the record *verbatim* (R. 34-40). Mr. Gallagher, counsel for the government, injected it into the cross examination of the petitioner as a purely collateral matter. He questioned the petitioner about a check in the amount of $500.00 given in July of 1949, which date is months prior to any alleged offense or even any shortage of grain in the warehouse, to Oren Couch and marked "advance 329 bushels of grain." He attempted to get the petitioner to admit the check was given for an interest in a race horse

instead of for grain as was indicated on the face of the check. The petitioner steadfastly refused to make any such admission and said that he had no present recollection of what the check had been given for. Failing to get such an admission, Mr. Gallagher perpetrated what we unhesitatingly brand as an outright, unethical and prejudicial trick when he made this statement before the jury (R. 37):

> "Do you know that the records of the New York Jockey Club, 250 Park Avenue, New York, indicate that a horse named Handy Grand was claimed by Oren Couch from La Loma Stud, on July 24, 1949, at La Mesa Park, Raton, New Mexico, and that the claiming price was five hundred dollars?"

This statement was not simply a shot in the dark, it was a simple baldfaced lie in a deliberate attempt to try to fabricate some connection between a perfectly innocent check and a race horse transaction having no relation to the business of Garden Grain & Seed Company!

The record includes the affidavit of Oren Couch (R. 7), submitted in connection with the post trial motion which shows definitely that the check was given for exactly what it purported to have been given for, to-wit, an advance on grain seed, which Couch was raising for Garden Grain & Seed Company. It further shows that the amount of $500.00 had no relationship whatsoever to the claiming price for the race horse, that in fact the claiming price for the horse was $800.00, that the petitioner never had an interest in the horse until several

months later, and that the *New York Jockey Club had no record of any kind whatsoever pertaining to who claimed Handy Grand or for what amount.*

Having perpetrated this trick, Mr. Gallagher then assumed in the rest of the trial that he had proved that the petitioner had purchased a race horse with the company's money. Even in his final argument to the jury, the trial court permitted him to argue as follows:

> "Do you remember the Couch check, a $500.00 check for the race horse? Do you remember the play that he made looking up to see if he could see the date it was cashed and admitting finally it was paid over to Couch four days after the race horse had been bought and he was paying his share for the race horse? * * * And he admitted that he had been in on the purchase of the race horse at or about that time. But he only admitted those things when he found out that *we had the information to prove it"* (Emphasis supplied).

This argument contained two more untruths, *viz.*, that Marteney had admitted the using of company money for a race horse, and also the unmitigated lie that Mr. Gallagher had any information to prove it. The "information to prove it" could only have been a reference to the diabolical trick that was employed in stating before the jury that the records of the New York Jockey Club verified Mr. Gallagher's statements.

It is no surprise that the same Mr. Gallagher who would attempt this kind of unethical chicanery against the rights of a defendant had to be fired from his Justice

Department position in June of the present year for comparable misrepresentation before a Grand Jury (Time Magazine, June 7, 1954, page 20). We submit that the court can no more condone such conduct than could the Attorney General of the United States.

The record is replete with all kinds of side remarks, sly innuendos, and argumentative thrusts committed by Mr. Gallagher during the trial, especially during the cross examination of the petitioner. It was apparent that Mr. Gallagher was attempting in every way possible to prejudice and inflame the jury against the petitioner. He was setting the stage for a violent attack upon the petitioner in his final argument to the jury, an argument largely devoted to the collateral issues that had been improperly brought into the case rather than to the basic issue of the conversion of grain. For instance, in addition to the deliberate lie about the race horse, he made arguments such as these (R. 51):

> "One would have thought he had lost completely all of the education he had since he was back in the fourth grade, although I think a fourth grader could have given a better performance, or a more sincere performance, and you compare that with the way he latched onto, if I may use a colloquialism, he latched on to that Atchison, Topeka & Santa Fe waybill. Well, he was poor when he started and he got rich quick. He got $229,000 from Strong, just in the transactions that you heard described here by the witness who came up here and told you about the payments.
>
> "What happened to that money? Ask him. I asked him and I failed to get an answer as I failed

to get an answer and you know what he was doing with it. He was not only converting the grain owned by the Commodity Credit Corporation together with those other depositors of grain there; he was converting the proceeds; he was not only stealing the grain, he was stealing the money afterwards."

There was not a single bit of evidence indicating that the money derived from the sales of grain was not accounted for in the corporation.

As an example of the oft repeated side remarks and argumentative statements of Mr. Gallagher, we have put into the record several pages of *verbatim* questions and answers (R. 26-34, incl.). For instance, when the petitioner in the course of his testimony stated that he did not recall that he personally had given the warehouse examiners the warehouse books, receipt books, etc., he made an answer, "I don't think personally I ever showed them anything." Immediately, Mr. Gallagher replied, "That is what I thought"! (R. 26).

A typical example of the argumentative harangue appears a little later (R. 26):

Q. "Oh. So that was the milo grain that you could have to substitute for the Commodity Credit grain that should have been in your warehouse at Pierceville, at Garden City?

A. No, sir. You asked what other point we had grain, Mr. Gallagher.

Q. Oh, I did?

A. Yes, sir.

Q. And you thought your answer that you had grain at one of these points would satisfy me, did you?"

Another example occurred when Mr. Gallagher was asking the petitioner about certain former testimony (R. 32):

Q. "Oh, didn't you do the thinking for the company?

A. Well, not in all cases, no sir.

Q. Well, you said you did, didn't you?

A. I don't believe I testified that I did all of the thinking for the company, no sir.

Q. Let me ask you what you did say. It is possible that someone got an answer from you."

Continuing in the same vein, and notwithstanding repeated admonitions from the court, the following occurred (R. 32):

Q. "All right. 'In the capacity of general manager, Mr. Marteney, you were, of course, familiar with the operation and financial condition of your corporation at all times, were you not?' And your answer was: 'Yes, sir' do you remember that?

A. Well, I would say my answer would be yes, sir.

Q. Look at the record there.

A. You see, you are asking me just identical questions.

Q. I am asking you a question you didn't want to hear asked, as a matter of fact, am I not?"

The brazen effrontery that characterized Mr. Gallagher's conduct was nowhere better typified than when he would ignore a ruling or admonition of the trial court and appear to appeal directly to the jury. One of the collateral matters which had no relationship to the matter of grain conversion was the testimony which Mr. Gallagher elicited on cross examination to the effect that the Garden Grain and Seed Company had engaged in certain livestock transactions. In his argument to the jury (R. 49) he held up a check in the amount of $7,136 which had been given for 37 head of steers, with the statement "For who? Marteney and Henderson." Thereupon, the following occurred:

> "MR. BLAES: Now, Your Honor, again I have to object to going beyond the record. Every word of evidence about that check was that that was for the corporation, that the corporation got every dollar out of it.
>
> MR. GALLAGHER: The testimony was exactly this, may it please Your Honor: It was that it was bought, the steers were bought with other capital in the name of Marteney and Henderson; that they were afterwards, after the sale and after the appointment of the receiver, they made good to the corporation the amount that they had realized, I leave that you gentlemen * * *
>
> MR. BLAES: That was what Mr. Gallagher tried to get him to say and Mr. Marteney insisted that that absolutely was not true; that they bought for the corporation and that the corporation was in the cattle business at that time.

THE COURT: I think that was Mr. Marteney's testimony.

MR. GALLAGHER: May it please Your Honor, I will not put my recollection up against yours, but mine was distinctly the other way.

THE COURT: I could be mistaken. I have been a good many times.

MR. GALLAGHER: *So I will have to leave it to the jury."*

We respectfully submit that the rights of the petitioner were seriously prejudiced by such conduct. The constant badgering of the petitioner during cross examination for a period of one and one-half days, the repeated onslaughts against the petitioner on matters wholly collateral to the offenses charged, the adept and continuous insinuation that assets of the petitioner's company had mysteriously disappeared, the attempt to hold the petitioner up to ridicule and contempt, the deliberate raising of false issues on collateral matters for the apparent purpose of nothing more than compelling the petitioner to explain his innocence in connection therewith — all these could not have any effect but to militate against the possibility of the petitioner's receiving a fair trial on the one basic and technical issue of the case, that is, the conversion of warehouse grain.

We ask the Court to measure such conduct against the principles laid down by the Supreme Court in the case of *Berger* v. *United States*, 295 U. S. 78, 79 L. Ed. 1314, in which the Court said in part:

"The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one * * *."

B. Introduction of Evidence on Collateral Matters was Error and was Highly Prejudicial.

As appears from the opinion of the Court of Appeals, it is obvious that the petitioner was compelled to stand trial over his objection on twenty-eight of the twenty-nine counts of the indictment when they did not even state an offense. Though we have been unable to find any clear-cut authority to the effect that such circumstances alone constitute a deprivation of a fair trial, it certainly should be considered as cumulative along with all other factors that militated against the petitioner's being fairly tried. It is beyond dispute that a defendant in a criminal proceeding is entitled to have brought up against him only those matters that are pertinent to an offense validly charged against him, but in this case the

petitioner had introduced into evidence a mass of transactions pertaining to the twenty-eight void counts. It goes without saying that, if the twenty-eight void counts had not been in the indictment at all, the inclusion in the trial of the great mass of evidence that purported to prove those counts would certainly have been reversible error and would have compelled a new trial for the petitioner. We respectfully submit that since the counts were void, the situation is the same as if they had not been in the indictment at all, and the grievousness of the error is the same.

Applicable here is the reasoning in the case of *Union Pacific R. Co.* v. *Field*, (1905), 137 Fed. 14, as follows:

> "Under our system of jurisprudence it is the province of the jury in actions at law to try and determine the rights of parties according to the law and the evidence. It is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure the litigants a fair and impartial trial. An omission by the court or counsel to discharge this duty, or a persistent violation of it, is a fatal error, because it makes the trial unfair."

In addition thereto, and without reference to the validity or invalidity of the various counts of the indictment, the trial court permitted counsel for the respondent to introduce evidence on a great number of wholly ex-

traneous matters. The worst example of these was the transaction pertaining to the race horse already referred to above. The indictment did not attempt to charge any offense as having occurred prior to April 1, 1950 (R. 2). The respondent's own testimony was to the effect that no shortage of grain developed in the warehouse until November 4, 1949 (R. 17). Yet, over strenuous objections of the petitioner the court permitted counsel for the respondent to examine the petitioner at great length about his purchase, together with one Oren Couch, in July of 1949, of a race horse (R. 34-40, incl.). Worst of all, there was not a single word of evidence connecting up the purchase of the race horse with the Garden Grain & Seed Company. The respondent produced a check dated July 28, 1949 payable to Couch in the sum of $500.00 showing on its face that it was an "advance 329 bushels of grain" (R. 36). No word of evidence ever indicated that this check had anything whatsoever to do with the race horse, but on the possibility that it might have something to do with the horse, and over the defense objection, the check was admitted into evidence (R. 45). In direct contradiction to the evidence, the court permitted counsel to argue to the jury as follows (R. 48):

> "Do you remember the Couch check, a $500.00 check for the race horse? Do you remember the play that he made looking up to see if he could see the date it was cashed and admitting finally it was paid

over to Couch four days after the two horses had been bought and he was paying his share for the race horse?"

Another wholly collateral matter had to do with the sale of some warehouse receipts to the Central States Company. Again at great length (R. 29-31, incl.), the court permitted counsel to harangue the petitioner about the fact that his company had sold some grain, as evidenced by warehouse receipts, to the Central States Company which had paid for it in cash and which was having to file a claim in the bankruptcy proceedings for reimbursement. To compound the prejudice, the respondent was permitted to come back to the subject a second time (R. 46 and 47).

Another example of a wholly collateral matter was one arising out of the issuance of a check which purchased a home for the petitioner and also some other property, the latter being for the corporation. Again over erroneous objections of the petitioner, the court permitted the evidence to be introduced, including the check in the amount of $24,500 (R. 40, 41). As a part of the house transaction, the respondent was also permitted to show that a further check in the sum of $2,000.00 had been issued for the purpose of doing certain work on the house (R. 42).

The next example had to do with the fact that prior to going into the warehouse business the petitioner had

incurred certain obligations in the ice cream business and that two company checks were drawn in 1950 to take care of these former obligations (R. 42, 43).

The next was the fact that a piece of property had been purchased from one Scott Farmer with a check for $8,000.00 and the legal title to the property had been taken in the name of the petitioner and his wife (R. 43, 44).

A particularly vicious example was cross-examination to the effect that the petitioner had permitted personal items for his home to be charged on an account at a department store in Hutchinson, Kansas against the Garden Grain & Seed Company (R. 44).

The great bulk of the foregoing matters were brought out by the respondent in cross examination of the petitioner, but the record shows that in direct examination the petitioner has offered no testimony whatsoever relating to any cash transaction. His testimony had been confined strictly to the charges, but the court permitted the cross examination to go into all of these extraneous matters.

The raising of a great number of collateral issues, thereby compelling the petitioner to explain and defend all of them cannot as a practical matter have any effect except to prevent a fair and just trial. Though the petitioner was able to point out on re-direct examination that there had always been a personal account with a

credit balance in his favor against which the personal items had been charged (R. 47), it is nevertheless true that a diversion of the attention of the jury from the matters really being tried in such matters serves only to prejudice the jury against the petitioner.

Even if the extraneous matters had amounted to criminal offenses, they would have been wholly collateral to the case on trial. In *Youman's* v. *United States*, 264 F. 425, a postmaster was being charged with willfully and feloniously converting money order funds to his own use. The prosecution attempted to prove that the defendant failed to make a daily deposit of the funds as required by the postoffice regulations. Such a collateral matter was held to be error, and the Court said:

> "Other evidence adduced, considered in the light of the existence of the rule mentioned, tended to prove the defendant guilty under that part of Section 225 of the Criminal Cod, which makes a postmaster guilty of embezzlement if he fails or refuses to remit or deposit postal funds when required to do so by regulations of the Post Office Department. The admission of the rule under the circumstances stated was calculated to make the impression on the jury that, in determining the question of the defendant's guilt or innocence of the charge made in the indictment, they could consider his guilt of conduct other than that so charged against him. The indictment charged him with willfully and feloniously converting to his own use post *office* money order funds. His guilt of conduct other than that charged was not a proper matter to be considered by the jury. A violation of the rule in question was not within the issues to be tried. An effect of the admission of

it in evidence was to enable the jury to consider the defendant's guilt in a respect not a proper subject of inquiry in the case on trial."

Further authorities on the same subject are numerous:

Suhay v. *United States*, 95 F. 2d 890;
22 C. J. S., Criminal Law, page 1123, Sec. 691.

C. The court's charge to the jury contained several substantial errors.

1. The Word "Willfully" Was Wrongfully Defined.

The court's charge on willfulness appears in full in the record (R. 57). Briefly, it is to the effect that willfulness is merely that characteristic distinguishing from inadvertence or mistake, and that the law presumes that every man intends the natural and probable consequences of his act, and that intent may be presumed from acts done with an indifference to the provisions of the law. The idea that "willfulness" had to include the knowing performance of a wrongful act with specific intention of taking the property of the Commodity Credit Corporation was nowhere included in the charge.

What is meant by the word "willfully" in the statute when it states that:

> "Whoever shall *willfully* steal, conceal, remove, dispose of or convert to his own use property belonging to the corporation shall upon conviction be punished * * *."?

There can be no doubt that the word "willful" is a word of many meanings. The exact definition and construction of the word is difficult to pinpoint. As always, the logical approach to determine the meaning is to look at the word in context. Many times it has been used to describe an act which is intentional rather than accidental. See *U. S.* v. *Murdock*, 240 U. S. 389, 394, 78 L. Ed. 381, 384, 54 S. Ct. 223, where it is stated:

> "The word (willfully) often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act with a bad purpose."

Pursuing this line of reasoning, one can see that merely the act of concealment, or the act of removal or disposal would not come within the scope of the definition of the word "willful" as it has been set out in the *Murdock case*. There is a distinction between acts which are criminal by the mere fact that such acts are done and those acts which must be done with a specific intent accompanying the act. In the former case, the law will impute the necessary intent. In the latter case, the law requires that actual knowledge of an obligation and a wrongful intent to evade it be alleged and proved. See *Hargrove* v. *United States*, 67 F. 2d 820-823.

The issue has been stripped to a single question: Is this type of crime in that class which requires a specific wrongful intent along with the other type of intent which

is attached merely because of the consequences of the actions of the defendant?

This can best be answered by looking at other similar statutes. In the *Hargrove case, supra,* the defendant was indicted and convicted under a statute making it a crime to *willfully* fail to report income and willfully evading a tax on this income. The defendant claimed that the following instruction was erroneous. It read in part:

> "A man may have no intention to violate the law and yet if he willfully and knowingly does a thing which constitutes a violation of the law he has violated the law."

The Court, in reversing the conviction and holding such a charge to the jury to be in error, made these statements:

> "The Court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal and where it denounces as criminal only its willful doing. In the first class of cases, especially in those offenses *mala prohibita,* the law imputes the intent. *Landen* v. *U. S.* (CCA), 299 F. 75; *U. S. v Balint,* 258 U. S. 250, 42 S. Ct. 301, 66 L. Ed. 604. Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence * * *."

The distinction between the two meanings of the word "willful" was well stated in *Nabob Oil Company*

v. *United States*, 190 F. 2d 478, by Judge Pickett in the following words:

> "In some penal statutes, the word 'willful' means that the offense must be committed malevolently, with a bad purpose or an evil mind. These offenses ordinarily involve moral turpitude but in those statutes denouncing acts not in themselves wrong, such an evil purpose or criminal intent need not exist. It is sufficient if the act was deliberate, voluntary and intentional, as distinguished from one committed through inadvertence, accidentally, or by ordinary negligence."

It is the petitioner's contention that the first of these two distinct meanings must be applied in the case at bar. The offense with which the petitioner was charged is one involving moral turpitude, to-wit, stealing. The offense is not a misdemeanor, but rather a felony carrying a very severe penalty.

If there were ever any doubt as to the correctness of the petitioner's contentions in the present case, they were certainly laid to rest by the recent decision in *Morisette* v. *United States*, 342 U. S. 246, 72 S. Ct. 240, 96 L. Ed. 288, from which we quote:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudice a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would

give to a proven fact an artificial and fictional effect * * *.

"Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, 'Did he intend to take the property?' That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, wrongfully to deprive another of possession of property. Whether the intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances."

The Court's Charge No. 9 (R. 57), submitted at the instigation of counsel for the respondent, literally flaunts the principles laid down by the Supreme Court. It sinned both by commission and omission. The first, by stating (a) that willful actions were simply "distinguished from inadvertence and mistake" and (b) by stating that the necessary criminal intent could be presumed from what the defendant did. The omission from the instruction consisted of its failure to state that the acts had to be performed with an actual evil intention, a specific knowledge that the act was wrongful, and a specific intention of taking the property of Commodity Credit Corporation and depriving it of such property. Not only were timely objections made to the instruction as given by the Court (R. 64), but the petitioner actually sub-

mitted a requested instruction conforming to the principles laid down in the *Morissette case* (R. 52). The failure to charge the jury as requested was a plain and serious violation of his rights.

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2. The Court Seriously Erred in Charging the Jury As to the Effect of the Commodity Credit Storage Contract.

Charge No. 10 (R. 58), also given at the instigation of the respondent, was a highly prejudicial misstatement of the law in two respects. (a) in stating that the ownership and interest of the Commodity Credit Corporation in the warehouse grain was fixed and determined by the contract between it and the warehouseman, and (b) in stating that the "enforcement of this contract" was a personal liability of the petitioner, thereby in effect telling the jury that the breach of the contract constituted the crime.

As a matter of law, the "ownership and interest" of the Commodity Credit Corporation in the stored grain had no relationship whatsoever to the contract. Its ownership was wholly and entirely dependent upon its purchase of a warehouse receipt issued under the Warehouse Receipts Act of the State of Kansas. Its ownership and interest would have been exactly the same even if the contract had never been entered into. The contract was an entirely disconnected transaction and neither added to,

not detracted from, the title and interest of Commodity Credit Corporation in the grain. Its sole and only effect was to set up contractual obligations and procedures with reference to the handling of the interest of Commodity Credit Corporation.

Whatever were the contractual obligations created by the contract, they were not the personal obligations of the petitioner. The petitioner was not personally a signatory to the contract. He assumed none of its burdens and could never have been sued upon the contract. The court's instruction in effect made the petitioner a policeman to personally guarantee "the enforcement of this contract." The jury could not escape the conclusion that a mere breach of the contract was the responsibility of the petitioner for which he would have to suffer at his peril. This charge in effect superseded all of the other charges given by the court and eliminated, once the jury found that the contract has been breached, any consideration of any defense to which the petitioner was entitled.

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3. The Court Seriously Erred in Incorrectly Charging the Jury as to the Effect of Performing an Act Through an Agent.

Charge No. 15 (R. 60), was given at the specific request of counsel for the respondent, but counsel carelessly failed to give the court the correct and current wording of the statute. The wording was that of 18 U. S. C.,

Sec. 2 prior to the amendment which became law on October 31, 1951. At that time, subsection (b) was amended to read as follows:

> "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

The change is the insertion of the word "willfully." The fact that Congress saw fit to amend the original wording shows plainly that the requirement of willfulness in this connection is not of idle significance. The change makes it crystal clear that evidence which merely shows the doing of an act through an agent is not sufficient, it must be a *willful* delegation of authority for the intended and evil purpose of effecting the crime through another.

The present case is an excellent example of the prejudicial effect of such an error. There was no evidence in the record that the petitioner personally had any connection with the shipment of the grain involved in any count of the indictment (R. 52). In other words, every shipment which is supposed to have been an offense was made, not by the petitioner, but by someone in the capacity of an agent. Accordingly, the defect in the instruction applies to every single count of the indictment. It was essential, before a conviction could be returned, that the jury should have found that the petitioner willfully

caused the act to be done by an agent. The faulty instruction permitted the jury to gloss over this essential.

The petitioner did not object to this instruction at the time it was given, this being for the obvious reason that it was assumed that the statute would be correctly quoted to the court and correctly read by the court to the jury. However, in such a vital departure from the elements of a criminal offense the court is duty bound to correct the error regardless of the absence of an objection. As was said by Judge Huxman in the case of *Miller* v. *United States*, 120 F. 2d 968:

> "Two of the defendants requested no instruction on character testimony, and none of them excepted to the instruction given by the court. Their failure in this respect does not, however, preclude us from examining the instruction. Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court. *Troutman* v. *United States*, 10th Circuit, 100 F. 2d 628, or even where the error was not reserved for review by proper objection, exception or assignment, *Strader* v. *United States*, 10th Circuit, 72 F. 2d 589 * * *."

The court arrived at the same result in the well known case of *Screws* v. *United States*, 325 U. S. 91, 89 L. Ed. 1495, 162 A. L. R. 1330, 65 S. Ct. 1031.

The theory adopted by the Government in the present case was that the alleged conversions consisted of the shipping of the carload lots of grain. Since the uncontradicted evidence is that no shipments of grain were made

by the petitioner personally, the error here was of major proportions and prevented the petitioner from having a fair trial with reference to any one of the shipments.

CONCLUSION

Petitioner earnestly submits that this Honorable Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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JANUARY, 1955.

APPENDIX

FILED
United States Court of Appeals, Tenth Circuit
Dec. 30, 1954
Robert B. Cartwright, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 4930 November Term 1954

WAYNE S. MARTENEY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Kansas

Emmet A. Blaes (A. Lewis Oswald was with him on the brief) for appellant.

Richard J. Blanchard, for appellee.

BEFORE HUXMAN, MURRAH, PICKETT, Circuit Judges.

PICKETT, CIRCUIT JUDGE.

The appellant, Wayne S. Marteney, was convicted and sentenced on all twenty-nine counts of an indictment which charged him with the theft and conversion of grain belonging to the Commodity Credit Corp., here-

in referred to as "CCC," in violation of 15 U. S. C. A. Sec. 714 m (c)[1]. Appellant was sentenced to imprisonment for a period of five years on each count, all sentences to run concurrently. The first twenty-eight counts charged that the appellant "did unlawfully steal, conceal, remove, dispose of and convert to his own use and to that of the Garden Grain and Seed Company, Inc., Garden City, Kansas", various quantities of grain sorghum which was then and there property owned by the CCC, an agency and instrumentality of the United States. Each of the first twenty-eight counts was identical in form with the exception of the dates of the alleged offenses and the number of pounds of grain alleged to have been stolen and converted. The dates of the conversions alleged in each of the different twenty-eight counts were between September 11, 1951, and December 21, 1951. Count 29 alleged:

> "During the period beginning from on or about April 1, 1950, to and including September 10, 1951, in the District of Kansas, the defendant, Wayne S. Marteney, did willfully steal, conceal, remove, dispose of and convert to his own use and to that of the Garden Grain and Seed Company, Inc., Garden City, Kansas, grain sorghum in excess of 5,000,000 pounds, approximately 89,000 bushels, which said grain was then and there property owned by Com-

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[1] This section provides: "Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another, any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

modity Credit Corporation, an agency and instrumentality of the United States."

The appellant by appropriate motions challenged the sufficiency of the first twenty-eight counts upon the grounds that they failed to allege that the acts complained of were done willfully. The motions were denied and that ruling is assigned as error. When "willfullness" is made an essential element of an offense, as it is in this case, it is a general rule that a failure to allege willfullness is fatal to the indictment. Fed. Rules of Cr. Proc. rule 7 (c), 18 U. S. C. A.; *Hagner* v *United States*, 285 U. S. 427; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Cook*, 84 U. S. 168; *Pullen* v. *United States*, 5 Cir., 164 F. 2d 756; cf. *Carter* v. *United States*, 10 Cir., 173 F. 2d 684, cert. den. 337 U. S. 946; *Lowenburg* v. *United States*, 10 Cir., 156 F. 2d 22; *White* v. *United States*, 10 Cir., 67 F. 2d 71. We shall not, however, labor the point as it is conceded that count twenty-nine is sufficient and that the sentence imposed does not exceed that which might lawfully have been imposed under that count. It is well established that where a defendant has been convicted on several counts, a judgment and sentence will not be reversed if the sentence does not exceed that which might lawfully be imposed upon any one count. *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *Brooke* v. *United States*, 267 U. S. 432, 441; *Abrams* v. *United States*, 250 U. S. 616, 619; *Evans* v.

United States, 153 U. S. 608; *Ward* v. *United States*, 10 Cir., 139 F. 2d 652.

The evidence of the prosecution tended to establish that grain sorghum which belonged to the CCC and which was in storage facilities with grain of others was converted by the appellant. It is urged that 15 U. S. C. A. Sec. 714 m (c) cannot be violated by the conversion of fungible goods from a commingled mass. The appellant was the vice-president and general manager of Garden Grain and Seed Company, Inc., a Kansas corporation, licensed by the State of Kansas to operate grain warehouse storage facilities at Pierceville, Garden City and Ingalls, Kansas. The CCC entered into grain storage agreements with the Company relating to grain of the CCC which was stored, and to be stored, in facilities at Garden City and Pierceville. The agreement provided that all grain sorghum covered by the contracts could be stored in a commingled mass. From April, 1950 through September 1951, the total grain stored in these facilities belonging to CCC varied from 22.72 per cent to 98.23 per cent of the total amount stored. The storage facilities consisted of grain elevators and storage space at a United States Air Base near Garden City which had been leased from the United States. The CCC acquired its grain from farmers, under the price support provisions of the Commodity Credit Corporation Act, 15 U. S. C. A. Sec. 714 c. The grain was generally represented by

warehouse receipts issued by the Compaany. The evidence is without conflict that the Company was short in its grain accounts from April 1950, too September 10, 1951.[2] The evidence is also without dispute that the Company, at the direction of the appellant, sold warehouse receipts and delivered large quanntities of grain to third parties during the period from Apriril, 1950, through September 10, 1951, when it did not havve in storage sufficient grain to meet the obligations of ouutstanding warehouse receipts. When CCC demanded ddelivery of grain represented by some of its warehouse recceipts, the Company was unable to comply. The appelllant admitted to an auditor that he knew he was short iin the grain account and stated that he could obtain covverage elsewhere.

[2] An auditor for the CCC testified that an audit cof the Company books showed CCC shortages from April, 1950, to Sseptember 10, 1951, as follows:

1950	1951	Pounds
April		31,680,712
May		31,680,712
June		31,680,712
July		31,680,712
August		31,680,712
September		25,633,562
October		18,777,448
November		18,777,448
December		15,715,558
	January	13,288,698
	February	13,050,258
	March	13,016,219
	April	13,016,219
	May	16,480,547
	June	15,794,107
	July	12,012,307
	August	12,021,307
	September (1 to 10)	12,021,307
		12,012,307

The prosecution made proof of the amounts of its grain which had been converted and sold, by showing deliveries by the Company when it was short of grain, and computing the interests of CCC according to the percentage of all grain in storage which it owned at the time of each delivery.

As was pointed out by the Supreme Court in *Morissette* v. *United States*, 342 U. S. 246, conversion of government property ordinarily cannot be reached as an embezzlement, or a theft, or purloining, even though the loss to the United States has the same effect as though the property had been embezzled, stolen or purloined. The purpose of the conversion provision in the general statute was to provide a penalty not already covered by statute if property of the United States was knowingly converted. 18 U. S. C. A. Sec. 641. The statute under which the appellant was indicted is part of the Commodity Credit Corporation Act, and its provisions and purposes are similar to the statute considered in the *Morissette case* but it applies only to property acquired under the Act. The principal difference in the two statutes is that in the general statute the offense is to "knowingly convert" property of the United States, while in the Commodity Credit Corporation Act it is to "wilfully convert" property of the CCC. The latter section denounces the wilful conversion of property acquired under the Act and the fact that this property was in a comming-

led mass and could not be specifically identified is immaterial, since the evidence established that the CCC owned a portion of the commingled mass of fungible goods which were wilfully converted. The appellant knew exactly how the grain was handled and could not have been misled or prejudiced by the method of proof. *Shannon* v. *United States*, 5 Cir., 209 F. 2d 835, cert. den. 347 U. S. 952, *Henderson* v. *United States*, 5 Cir., 203 F. 2d 81; *Dawson* v. *United States*, 5 Cir., 203 F. 2d 201

The Warehouse Receipts Act of Kansas (Kan. G. S. 1959, Ch. 82, Sec. 207), makes it a crime in Kansas for a warehouseman to issue warehouse receipts or certificates when the commodities described therein are not in fact in the building or buildings which it is certifed that they are in; or to sell, transfer or remove from the building any of the certified property without the consent of the holder of the certificate or receipt. This section includes the acts prohibited by 15 U. S. C. A., Sec. 714 m (c), but acts denounced as crimes by both national and state sovereignties are an offense against both, and may be prosecuted by each. *Feldman* v. *United States*, 322 U. S. 487; *Jerome* v. *United States*, 318 U. S. 101; *United States* v. *Lanza*, 260 U. S. 377; *Weeks* v. *United States*, 232 U. S. 382; *Serb* v. *United States*, 5 Cir., 203 F. 2d 576, cert. den. 364 U. S. 887.

VIII

The appellant contends that the trial court's instructions to the jury contain several substantial errors. The first error complained of refers to the definition of the word "wilful." Wilful conversion as used in Section 712 m (c) is a crime in the nature of a theft and falls within that class of cases requiring specific wrongful intent and a bad motive. *Nabob Oil Co.* v. *U. S.*, 10 Cir., 190 F. 2d 478, cert. den. 342 U. S. 876. Considering the entire instruction on the subject, we think it was sufficient to properly define the terms. The court explained to the jury that the simple conversion of property, though wrong, would not ordinarily be a crime. The jury was instructed that for a conversion to be a crime, it must be a wilful conversion and that it is dependent upon the intention with which it was committed. The court stated that the term "wilfully" as used in the statute meant "intentionally" or "with the purpose of." It was said to be an "attitude of mind and will and carries with it the thought of intentional ignoring of the law, or an indifference to its provisions." The jury was further told that to find that the appellant had converted property as charged in the indictment "you must find that his actions were willfull and intentional as distinguished from inadvertence and mistake." Although the jury was not told in so many words that the offense must be committed malevolently, with a bad purpose, or an evil mind, no

other reasonable construction can be given to the language used.

It is contended that the court's instruction, which stated that the ownership and interest of the CCC in the grain for which it held warehouse receipts are fixed by the contracts entered into between the CCC and the warehouseman issuing warehouse receipts, and that the appellant as an officer and general manager of the Garden Grain and Seed Company, Inc., was bound by law to see to the enforcement of this contract, was erroneous. The contract provided that the warehouseman should at all times maintain in the warehouse sufficient quantity of grain to meet the obligations of the outstanding warehouse receipts. The instruction did no more than to state the source of the title of the CCC, and the conditions under which the grain was stored, together with the obligation of the appellant as one of the principal officers and general manager of the warehouse company. What constitutes a criminal conversion of the grain held under this contract and warehouse receipts obtained as grain is acquired is defined in other parts of the instructions which are not questioned. The contract provided the conditions upon which the grain owned by the CCC through warehouse receipts was to be stored and delivered, and the two instruments must be considered together. The appellant could not have been found guilty of a conversion of the grain held under the contract and the ware-

house receipts by mere breach of the contract, but only for a willful conversion. The reference to the contract provisions may not have been necessary, since the title to the grain would ordinarily follow the warehouse receipts, but such reference was not prejudicial to the appellant.

In its instructions defining who is a principal to an offense against the United States, the court referred to 18 U. S. C. A. Sec. 2. This section, as amended on October 31, 1951, reads:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Prior to amendment, this section read:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> "(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

This is the section which was read to the jury. It is contended that the instruction did not correctly state the law and was prejudicial to the defendant because the word "willfully" was omitted. The defendant made no objection to this instruction as required by Rule 30, Federal

Rules of Criminal Procedures, 18 U. S. C. A., and may not now complain. *Thayer* v. *United States*, 10 Cir., 168 F. 2d 247; *Bartlett* v. *United States*, 10 Cir., 166 F. 2d 920; *Brenbeim* v. *United States*, 10 Cir., 164 F. 2d 679; cert. den. 333 U. S. 827.

In any event, we do not find the instructions as given to be prejudicial as the appellant admitted that he, better than anyone else, knew the financial condition of the Company and that it was his responsibility to "purchase and sell all grain handled by the corporation." The record shows that he exercised such responsibilities, although he may not have actually used a shovel or manipulated the loading machinery to transfer the grain for delivery.

The appellant offered an instruction to the effect that there was no evidence showing that the CCC had ownership of any grain except such as had been commingled with stored grain in the warehouses. The offered instruction obviously had reference to the first twenty-eight counts. We think that considering the circumstances under which the shipments were made, the instruction was properly refused. The shipments were all made from a warehouse of the company when it was short on its outstanding grain obligations. The appellant himself testified that the shipments referred to in the first twenty-eight counts were made to various consignees, but that he did not know if they all came out of the

commingled mass of grain in the warehouses. But there were circumstances from which this fact could be inferred. The instructions clearly left to the jury the question of the ownership of the grain alleged to have been converted. In any event, the instruction related only to the first twenty-eight counts, and if there was error, it was harmless, as the conviction on count twenty-nine must stand.

The final assignment of error is that the conduct of counsel for the United States before the jury was of such a character as to be prejudicial to the appellant. This contention is based upon the assertion that counsel for the United States injected into the proceedings on the cross-examination of the appellant, matters which were entirely collateral to the issues and highly prejudicial to him when argued to the jury. The cross-examination referred to consisted of questions relating to the purchase of an interest in a race horse by the appellant; sales of warehouse receipts to a particular purchaser for large quantities of grain, when the Company did not have such grain in its possession; and the expenditure of substantial sums of the Company's money for the use and benefit of the appellant personally.

The appellant took the stand in his own behalf and attempted to convince the jury that he had not willfully done anything wrong. He testified that until a short time before the bankruptcy proceedings, he believed that

the Company had sufficient grain to meet its liabilities, although some of it may have been out of position,[3] even though the Company's books were woefully inadequate to reflect this information. His testimony was that he never had any intention of doing anything illegal or wrongful. The cross-examination developed that the appellant had given a Company check to Oren Counch for Five Hundred Dollars. The check indicated on its face that it was in payment for grain. The appellant admitted that about that time he had acquired an interest in a race horse with Counch and he would not say that it was not actually in payment for an interest in the horse. The other matters about which the appellant was questioned on cross-examination were the expenditure of Company funds to purchase a home and other property for the appellant, and to pay personal obligations in excess of $25,000. In view of the appellant's defense, these matters were clearly within the issues.

While cross-examination should be limited to matters brought out on direct examination and to subjects which are relevant to the issues, the purpose of cross-examination is to elicit the truth. For this purpose the examination of collateral matters rests largely within the discretion of the trial court, and its ruling will not be disputed unless it appears that there has been a clear

[3] "Out of Position" is said to mean grain which may be used to meet outstanding obligations, although not stored in the place designated by the outstanding certificates.

abuse of this discretion and an injustice done. 58 Am. Jur., Witnesses, Sec. 624; *Atkinson* v. *Atkinson, Topeka & Santa Fe Ry. Co.*, 10 Cir., 197 F. 2d 244; *Williams* v. *Graff*, 194 Md. 516, 71 Atl. 2d 450, 23 A. L. R. 2d 106. We find no abuse of discretion. We have carefully considered the appellant's contention of improper conduct on the part of government's counsel. While he may have overstepped the bounds to some extent in his argument to the jury, we feel that considering the record as a whole, in a case of this kind, there was no prejudice to the appellant. We also find after a careful examination, that there was ample evidence to sustain a conviction as to the twenty-ninth count. JUDGMENT AFFIRMED.